THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MARCH 31, 1876. { Hon. JOHN F. DILLON Contributing Editor.

With this number of the JOURNAL we send to our last year's subscribers a steel engraving of Judge Dillon, executed by the Western Engraving Company, of Saint Louis. This picture is, intrinsically, a very fine specimen of portrait engraving; but it has some trifling faults which give it a *tout ensemble* somewhat different from the original, as those who have frequently seen Judge Dillon will readily observe. It is, however, as close a representation of the photograph from which it was made as steel engraving can generally attain to. Nothing but the sun itself can make an exact reproduction of every outline; and we accordingly refer to the heliotype likeness of Judge Dillon published in the January number of the *Southern Law Review* as an exceedingly close representation of the Judge as he now appears. We hope to be able next New Years to present our readers with a portrait of some other distinguished living jurist or legal author; and we trust that no mishaps will intervene to delay its issuance, as was the case this year.

Copyright in Foreign Dramatic Compositions—The "Two Orphans" Case.

Elsewhere we print an apparently well-considered opinion of Mr. District Judge Nelson, delivered in the United States Circuit Court for the District of Minnesota in the case of Shook v. Rankin, involving the question of the proprietary interest in the celebrated play known as "The Two Orphans." This play has been the subject of a great amount of litigation. The first suit, we believe, was the case of Shook & Palmer v. Thorne in the Superior court of the city of New York in 1874. We understand that the plaintiffs succeeded in that suit and obtained a perpetual injunction restraining the defendant from representing the play in the city of New York. Mr. Auther McKee Rankin, at the head of what was known as "The Rankin Combination," began playing the piece at various cities outside of New York in the summer of 1875. On the 24th of August, a provisional injunction was granted against him by Mr. District Judge Gresham, sitting in the United States Circuit Court at Indianapolis, restraining Mr. Rankin and his company from representing the play. This injunction was afterwards modified so as to permit the defendants to play the piece according to Oxenford's version, which will be understood from what we shall say further on. On the 2d of September a similar injunction was granted at Milwaukee, by Mr. District Judge Dyer, sitting in the United States Circuit Court for the Eastern District of Wisconsin. This injunction was afterwards dissolved on final hearing. The next suit in order of time was the one at Saint Paul, which was decided September 16th, and the opinion in which we elsewhere print. On the 20th of the same month suit to enjoin the representation of the play was brought against the defendants in the United States Circuit Court at Chicago. They were now able, for the first time, to produce a printed copy of John Oxenford's translation of the play. Mr. Circuit Judge Drummond enjoined them from playing Mr. Jackson's, but permitted them to play Mr. Oxenford's version. We believe the next suit in point of time was the one at Saint Louis, of which we gave an account in this journal, Vol. 2, p. 730. In this last case the merits were not reached, and it it still pending in the United States Circuit Court. Another suit, we understand, is pending in the Supreme Court of Louisiana, and there may be still other suits pending in other courts of which we have not been advised.

The history of the play of "The Two Orphans," so far as we have been able to gather it, is as follows: It was originally written by two Frenchmen, D'Ennery and Cormon. Mr. N. Hart Jackson, an American dramatic author, visited Paris in 1873, and obtained from the authors the privilege of making an American "translation and adaptation" of the play, for use in the Union Square theatre, New York. For this he paid the French authors a consideration, and they in turn agreed not to *publish* the play in book form for one year thereafter. Mr. Jackson made this "translation and adaptation" and coprighted it in the office of the librarian of Congress, claiming to be its author. It will be seen that in the case made before Nelson, J., Mr. Jackson is claimed to have been a "joint author." Another English version of the play was made for representation in London, by Mr. John Oxenford, dramatic editor of the London *Times*. The original play has been published in Paris in book form, and Mr. Oxenford's translation has likewise been published in London. An American novel, containing the elements of the play, was published by Monroe & Co., of New York. We have also seen a similar piece called "The Orphans," in an English serial paper.

Two questions appear to arise in this litigation: 1. Has there been such a *publication* as deprives the French authors (and consequently those claiming through them) of what is sometimes called the common law copyright—that is, the right which every author has to the exclusive use of his manuscripts before they have been dedicated to the public by publication?[1] This main question embraces a secondary question of great importance, and that is, whether the representation on the stage of a dramatic composition, is such a publication as destroys this common law copyright. 2. The second important question which we conceive to be involved in this litigation is, whether an American who "translates" and "adapts" a foreign dramatic composition, can have therein, by virtue of our copyright law, such a statutory right as will prevent another person from representing on the stage another "translation and adaptation" of the same piece. These questions are understood to be involved in the case which is pending in the United States Circuit Court at Saint Louis. We trust the able judges of that court will find time, when the case is decided, to write an opinion covering all the points involved. It will be of much interest to the legal profession and to the literary world.

Fees and Costs.

A question as to the liability of parties to a suit, for fees and costs, was recently decided by Judge Lindley, of the Circuit Court of Saint Louis County. The facts in the case are as follows: Mr. Vay recovered judgment against McDonald *et al.*, which was entered in the following words: "Now at this day come again said parties by their respective attorneys, and also come the jurors empannelled and sworn herein, and having agreed upon their verdict, the jurors aforesaid, upon their oath aforesaid say they find for the plaintiff, and assess her damages at one thousand dollars. It is therefore considered by the court that the plaintiff recover of said defendants, the damages aforesaid as assessed, and also her costs and charges herein expended, and have execution therefor." Plaintiff received and ac-

[1] For an account of this species of copyright, see Isaacs v. Daly, 1 CENT. L. J. 141 and note.

knowledged full satisfaction of her judgment. Fees due for services rendered by officers of court, witnesses, etc., were unpaid. Execution for said fees issued against defendants. Defendants resisted the execution, maintaining that they were liable only *for services rendered at their request*, and *not for services rendered for the plaintiff;* that there is a distinction between *fees* and *costs;* that the former is *something due from a party to officers, etc., for labor performed upon request*, and that the latter is *something due from one party to the other party on account of expenses or liablility incurred by the latter in conducting his suit;* that they were liable for *fees*, because they had contracted therefor; that they were not liable for *costs*, because they *had already paid all the costs* to the plaintiff, who was the only person entitled thereto, and who had acknowledged the receipt thereof by acknowledging satisfaction of judgment. Wherefore they moved the court to order the clerk to assess fees due for services rendered at request of defendants, and, also, for an order on the sheriff to return satisfied the execution upon obtaining such fees. Authorities cited are, 11 Serg. & Rawle, 248; Watt's Reports, vol. 6, 445; 10 Louisiana Annual, 582. The motion was sustained. Wm. Schaumleffel appeared as attorney for defendants. Several counsel appeared for the plaintiffs.

We ask the especial attention of the Saint Louis bar to this judgment. The unquestioned ability of the judge who rendered it, and the further fact that the question was before him for some time before he decided it, makes it of more than ordinary importance. The Missouri Statute (1 Wagn. Stat. p. 343, § 6) provides that "in all civil actions or proceedings of any kind, the party prevailing shall recover *his costs* against the other party, except in those cases where a different provision is made by law." It further provides (§ 11) that "in all actions not founded on contract, the damages claimed in the petition shall determine the jurisdiction of the court, and if the plaintiff recover any damages, he shall recover *his costs*." The conclusion which the learned judge has arrived at seems to overturn the general professional understanding and practice in this state. Both the terms employed in the statute and those made use of in the judgment entry above quoted, appear to have been borrowed from the old English system, and, as applicable to that system, are readily understood; but, when applied to our system, are liable to produce difficulties and complications. Under the English practice each party paid his own costs as the various steps in the suit were taken; and hence, when final judgment was rendered, in order to place the successful party *in statu quo*, it was only necessary to adjudge that he should recover the costs *which he had expended*. But by the modern American practice, the costs, as a general rule, are not paid when the services are rendered, but are left to abide the event of the suit; and are recovered in the name of the successful party, for the benefit of the officers of the court to whom they belong. It will be remarked that the only substantial difference between the old system and the new consists in the fact that the old system was a *cash* system, whereas the new system is a *credit* system. Under either system *the losing party* pays *all the costs*, if they are paid at all. The judgment in this case, it seems to us, meant to say, *that the plaintiff recover of the defendant, for and on behalf of the officers of the court respectively entitled thereto, the costs of this suit.* The statute evidently contemplates just such a thing as existed in the old practice, and the result which it designs to reach is the precise result which it would have reached were the old cash system still prevailing, namely, that the losing party shall pay all the costs. In our humble judgment the decision of Judge Lindley is erroneous in so far as it falls short of this result. It makes the defendant pay his own proper costs which he must have paid in advance under the old system, but it fails to make him also pay the plaintiff's costs, which under the old system he would have been obliged to pay, and which the statute says he shall pay. If this anomalous decision is based upon a supposed distinction between *costs* and *fees*, this is a distinction which will certainly surprise the profession in this state. Unless we are greatly mistaken, the universal understanding has always been that costs and fees are the same thing, and that the difference in name depends simply upon the circumstance whether you shall look at the shield from the litigant's side, or from the officers' side. Thus, the *litigant's costs* are the *officers' fees* and *vice versa*.

We are glad to learn that the officers of the court have determined to appeal this case, and that we shall hence have at least one more guess upon the question.

When Courts will declare Statutes Unconstitutional.

In passing on the constitutionality of statutes, courts generally express in various ways the idea that the judiciary will not interpose to declare an act of the legislature unconstitutional except on very clear grounds, and that all doubts must be resolved in favor of the validity of the acts of the legislature. This idea has been expressed variously. In the case of People v. Lynch (3 Am. L. Times Rep. N. S. 131), in the Supreme Court of California, we find the following most interesting comments on this topic in the opinion of the court, delivered by McKinstry, J:

"I propose to indicate what I conceive to be an erroneous view, in respect to the exercise by the courts of the power of declaring statutes in conflict with the state constitution.

"It is often assumed, and sometimes asserted, that it is the duty of the judges to sustain, by strained interpretation, a law, which at first view is in apparant derogation of that instrument. I concede that a court should hesitate to declare a law unconstitutional, as it should to render any decision involving important consequences only after due deliberation. But on the other hand, the judges may not indulge an indisposition to assume responsibility by falling back upon *phrases*, used by jurists, however distinguished, which, fairly construed, mean only that great caution is to be employed in this, as in other judicial action.

"Since the case of Sharpless v. The Mayor, &c. (Penn. St. 147), perhaps no argument has been made in favor of the constitutionality of a statute in which the language of the Chief Justice of Pennsylvania has not been quoted: 'We can declare an act of the assembly void only when it violates the constitution clearly, plainly, *and in such manner as to leave no doubt or hesitation in our minds.*' Yet it is manifest that the accumulation of adverbs and clauses, while it may give euphony to the sentence, adds no force to the meaning, which remains the same as if the able judge and brilliant writer had said that a court must be clearly satisfied that a law is unconstitutional before it can declare it to be so. He certainly did not mean that a statute should be upheld, whenever a doubt could be suggested that it might be constitutional; for this would be an abdication of the judicial functions of determining the validity or invalidity of statutes on that ground. The court cannot shirk the responsibility of deciding such questions, when presented; it is as much their duty to consider the constitution, in ascertaining what is the law, as to consider the statute. This duty must be performed, whatever the consequences.

"The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the

requisitions of an act of the legislature, when it appears to them to have been passed in violation of the constitution, would be to contend that the law was superior to the constitution, and that the judges had no right to look into and regard it as a paramount law.' 'The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them.' 1 Kent's Com. 449.

"However apt the expression, 'beyond all reasonable doubt,' when referred to the action of a jury upon an issue of fact in a criminal case, the words have no peculiarly appropriate application to the action of a court upon any issue of law, since, in theory, every adjudication is made after full consideration of all doubts of its correctness. Nor is it true that we can never hold a law void, unless we can find in the constitution some specific inhibition which in precise language refers to the particular law. Human ingenuity would fall short of anticipating every possible mode by which might be consummated an abuse of legislative power, which the people in constitutional convention desired to guard against. The providence of constitution makers must find expression in broader terms; but whether restrictions on the legislative power be declared as general and affirmative propositions, or appear as necessary inferences from a comparison of different portions of the constitution, it is equally the province of the courts to determine whether a particular law falls within any of them. It is not for the judiciary primarily to enquire whether the legislature has violated the *genius* of the government, or the principles of liberty, or rights of man, or whether its acts are expedient, but only whether it has transcended its powers. Dwarris on Statutes, 269. It does not result, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Cooley's Const. Lim. 171. Under our constitution the senate and assembly can perform any legislative act (not prohibited), not because there is any magic in these names which absorbs all power not specifically conferred on the other departments of government, but because the constitution places the legislative power in the senate and assembly in general terms. By the tenth amendment of the constitution of the United States, it is provided: 'The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, *or to the people*.' The government of the United States can exercise only such powers as are expressly granted to it, and such as are necessarily implied from those granted. It follows from this, that the people of the states respectively retain such powers as have neither been granted, expressly or by implication, to the government of the United States, nor conferred on the state government."

Measure of Damages for Breach of Contract by Carrier.

SIMPSON v. THE LONDON AND NORTHWESTERN RAILWAY COMPANY.*

High Court of Justice, Westminster Hall, Queen's Bench Division, January 18, 1876.

The plaintiff was a manufacturer of cattle spice, etc., with samples of which he was in the habit of attending agricultural shows. The defendants received samples of cattle spice, etc., from the plaintiff's agent on the show-ground of an agricultural cattle show to be forwarded to N., where another cattle show was about to be held, by a day named on the consignment note. The goods did not arrive at N. till the show was over. *Held*, that the plaintiff was entitled to recover damages for the loss of profit he would have gained on orders received through the exhibition of his samples at the show, and for his loss of time in waiting at N. for the goods to arrive.

Action against the defendants as carriers of goods for non-delivery of certain goods of the plaintiff delivered to them to be carried from Bedford to Newcastle-upon-Tyne in time for a certain cattle show to be held at Newcastle, whereby the plaintiff lost profits and incurred fruitless expense. In another count the plaintiff sued the defendants for not delivering within a reasonable time goods delivered to them to be carried from Bedford to Newcastle-upon-Tyne.

The defendants paid £10 into court; and the plaintiff replied damages *ultra*; whereupon issue was joined.

On the trial at the Surrey Spring Assizes, 1875, before Cockburn, C.J., it appeared that the plaintiff was a manufacturer of cattle spice, cattle meal, and calf meal, and was in the habit of attending the various cattle shows taking place in the United Kingdom, with samples of those wares. In July, 1874, he attended the cattle show at Bedford, and during the progress of that show, on the 16th of July, he went to London, and thence, on the 18th, to Newcastle-upon-Tyne (where another show was to be held on the 22nd, 23rd, and 24th of that month), to make arrangements, leaving his son in charge at Bedford, with instructions to forward the samples used at Bedford to Newcastle so as to arrive on Monday, the 20th. The defendants had an office and clerks upon the show ground at Bedford, and from that office the plaintiff's son received a form of consignment note, which he filled up and returned to one of the clerks for them to collect the goods for carriage, explaining to them the object for which they were wanted at Newcastle. The note had written across it the words "Must be at Newcastle on Monday certain" in the handwriting of the plaintiff's son. On the Monday the plaintiff enquired at Newcastle station for the goods, and remained at Newcastle until Friday, up to which time they had not arrived. The Newcastle show was held on the Wednesday, Thursday, and Friday. At the conclusion of the plaintiff's case a verdict was entered for £20, with leave to the defendants to move to set it aside and enter a verdict for them on the ground that damages for loss of profit or loss of time were not recoverable.

A rule having been obtained accordingly,

Thesiger, Q.C., and *Lumley Smith* showed cause. The consignment note containing the words "Must be at Newcastle on Monday certain," is important as bearing upon the question of notice. O'Hanlan v. The Great Western Railway Company, 13 W. R. 741, 6 B. & S. 484, is in point. [Cockburn, C.J.—We must take it here that the defendants knew the purpose for which the goods were to be sent down to Newcastle, because they have an office on the ground. If the agent of the defendants at Bedford received them on the ground he must have known what they were to be sent to Newcastle for. Field, J.—Watson v. The Ambergate Railway Company, 15 Jur. 448, is the nearest case to this.] Where the object is stated, damages in respect of that object are a proper subject of claim. The Great Western Railway Company v. Redmayne, L. R. 1 C. P. 329, throws light upon the point. In Horne v. Midland Railway Company, L. R. 7 C. P. 583, affirmed 21 W. R. 481, L. R. 8 C. P. 131, the court held the plaintiff could not recover excessive profits, but that he could recover the ordinary profits; and they seemed to hold that even unusual damages might have been recovered, if there had been notice. [Field, J.—Amounting to a contract to pay them.] Cory v. Thames Ironworks Company, 16 W. R. 456, L. R. 3 Q. B. 181. Each case must be judged of by its own facts and merits. [Cockburn, C.J.—The damage claimed must be some damage within the contemplation of the parties.] You must start with common knowledge, and then the damages must not be too remote; see judgment of Martin B., in Wilson v. Newport Dock Company, 14 W. R. 558, L. R. 1 Ex. 177.

Gates, Q.C., and *Anderson* supported the rule. There was no notice to the defendants of the object for which the goods were required to be at Newcastle, or the nature of the goods themselves. [Field, J., referred to the competition between the defendants, the Great Northern Railway Company, and the Midland Railway Company at Bedford, as explaining the readiness of the defendants to take the contract insisted upon by the plaintiff. Cockburn, C.J. You did not call the clerk. Field, J. In Vaughton v. London and North-Western Railway Company, 22 W. R. 336, L. R. 9 Ex. 93, the fact that a person in the defendant's employ suspected of felony was not called was strongly relied upon.] Woodger

* From the report in 24 Weekly Reporter, 294.

v. Great Western Railway Company, 15 W. R. 383, L. R. 2 C. P. 318, shows that damages for delay cannot be recovered. [Field, J. We infer to-day that what did not exist in Woodger's or Redmayne's case did exist here.] British Columbia, &c., Saw Mill Company v. Nettleship, 16 W. R. 1046, L. R. 3 C. P. 499; Crouch v. Great Northern Railway Company, 11 Ex. 742, 4 W. R. C. L. Dig. 207.

COCKBURN, C.J.—I am of opinion that in this case the rule must be discharged. The law upon this subject, as it is to be found in the reported cases, has not always received a uniform construction. The doctrine as to damages for breach of contract by a carrier has fluctuated. But I think it is now settled that, wherever the prospect of loss of profits was either expressly brought to the knowledge of the carrier, or the goods were received under such circumstances that he ought reasonably to have inferred their nature and destination, so that the use of them might be within the contemplation of both parties, then the plaintiff is entitled to recover damages for the loss of profits he would have made if the contract had been duly carried out. I deal with this case as a juryman. From the facts before us, can it be reasonably inferred that the defendants did know the purpose to which these things were to be put at their place of destination? I see no difficulty in arriving at that conclusion. These things are articles with which the plaintiff deals in his business. He is in the habit of going about the country exhibiting these articles to get orders, they being samples put forward to attract the attention of persons going to the shows. At Bedford the defendants had an office on the ground with a view to getting the custom of persons attending the show to send things by their railway. When the plaintiff, who had been exhibiting, as the clerk must have known, came to the office and desired these things to be conveyed to another place, the clerk must have known they were to be transported for the purpose of exhibition. And when the plaintiff's son produces a consignment paper, and the clerk takes the goods with that consignment paper, it is impossible to believe the clerk did not know the goods were to be exhibited at Newcastle, and were samples of the goods in which the plaintiff dealt, it being the practice not to take the goods in bulk but in samples. Under these circumstances the principle applies, and the defendants must be taken to have contemplated the use for which these goods were required to be at Newcastle on the day named. But then it is said the damages cannot be ascertained. But they can by taking the average of the plaintiff's profits through the year; and it is monstrous to say that because of the difficulty in assessing them they are to be treated as nothing. Any jury would be able to fix them at some reasonable amount.

MELLOR, J.—I am of the same opinion. My judgment proceeds partly upon the facts. I look at them as a juryman. From the circumstances and the contents of the contract note, and the direction that they were to be at Newcastle on a given day, I come to the conclusion that the clerk had notice of the nature of the goods, and that they were required to go to Newcastle, there to be dealt with as they had been at Bedford. The opportunity was lost by the conduct and negligence of the defendants. I am not troubled by the amount of the damages. We may conclude the plaintiff lost an opportunity, and in that sense sustained loss for which the defendents are liable.

FIELD, J.—I am of the same opinion. For breach of contract a man is entitled to recover such damages as are the natural consequence of such breach, and which may be taken to be within the contemplation of the parties at the time of entering into the contract. The contract was to carry goods under circumstances somewhat unusual, for it is not often companies consent to take goods to be delivered by a certain day. The circumstances of the case fortify the contention of the plaintiff. He gives good reasons for the view he takes. The contract was made upon the show ground of an agricultural county like Bedford. There was an agent of the defendants upon the show ground for the very purpose of taking contracts. That being so, I should certainly infer that the object was to send goods of this description somewhere. Where to? To a similar show ground at Newcastle. With what object? To be used for the same purpose as at Bedford. Is there *prima facie* evidence to that extent? I think, yes. If the agent shut his eyes and did not know anything about it he might have been called to say so. But he was not called. That circumstance is relied upon with great propriety. I certainly do infer that both parties were aware of these circumstances. As to the damages, it is said they cannot be recovered, because they are speculative. But a man like the plaintiff, who employs his whole time in his business, does not do it without a profit. Every day is an integral portion of the time he devotes to it; why should not an integral portion of his profit be assigned to each day? I think the verdict a very moderate one.

Rule discharged.

Solicitors for the plaintiff, *Chorley & Crawford.*

Solicitor for the defendants, *R. F. Roberts.*

Municipal Subscription to Railroads—Ultra Vires.

PITTSBURG AND STEUBENVILLE RAILROAD CO. v. ALLEGHANY COUNTY.*

Supreme Court of Penneylvania, November 15, 1874.

A special act authorized the commissioners of Alleghany county to subscribe for stock of a railroad corporation, payment therefor to be made in bonds of said county, bearing six per cent. interest, at par, which bonds the company was authorized to receive. The county subscribed for the stock, but upon the condition, which was agreed to by the directors of the railroad company, that the railroad company should pay six per cent. interest on the stock so taken by the county. The lessees of the railroad subsequently defaulted, whereby the company failed to pay interest to the bondholders. Upon a case stated (after a special verdict) between the county and the railroad company, to determine the liability of the latter for the payment of interest to the bondholders. *Held*, (1) that the contract was unauthorized by the act, which contemplates that the county should stand in no other or better position than other stockholders of the company; (2) that, the directors of the railroad having acted *ultra vires*, the company could repudiate the contract requiring it to pay to the bondholders preferred interest on the stock subscribed for by the county.

Error to the Court of Common Pleas of Alleghany County.

Case stated, in which the county was plaintiff and the railroad company defendant.

By an act of assembly, approved 24th February, 1853, P. L. 133, the commissioners of Alleghany county were empowered to subscribe for not exceeding 10,000 shares of the capital stock of the Pittsburgh and Steubenville R. R. Co., and the company was authorized to receive the bonds of said county, bearing interest at the rate of six per cent. per annum, at par, in payment of said subscription.

On July 15, 1853, the county commissioners agreed to subscribe for 6000, and on June 12, 1854, for 4000 shares of the stock, and deliver the bonds of the county in payment thereof, provided the company would agree to pay interest on said stock at the rate of six per cent. per annum, the same to be pavable to the persons to whom the said bonds might be sold.

This proposition having been unanimously accepted by the stockholders of the company who were present at meetings called for that purpose, the contract was entered into by the directors, the subscription was made, the stock issued, and the county bonds were delivered, and were afterwards sold by the company.

The interest on these bonds was paid by the company until January 15, 1856; in May, 1856, the board of directors (the county being represented) then leased the road to certain persons, they agreeing to pay to the stockholders, on and after July 1, 1857, interest on the capital stock at the rate of four per cent. per annum, which was afterwards changed to forty per cent. of the gross earnings of the road. The road has been operated ever since under this contract, but no money has ever been paid to any of the stockholders, nor has the interest on the bonds been paid by the company.

It also appeared that on December 4, 1860, the stock of the county was sold under a *fi. fa.* issued out of the Circuit Court of the United States, but the company had never permitted it to be transferred to the purchasers on the books.

The jury found the foregoing facts in a special verdict; and, also, that prior to the date when the payments were to have commenced under the lease, the county had paid interest on their bonds amounting to $45,591.90; up to the date of the sale of the county's stock it had paid $153,974.80, and up to the institution of the suit it had paid $242,448.74.

Whereupon, the court, on August 31, 1865, entered judgment for the county for $242,448.74, being the full amount claimed.

No bill of exceptions to this judgment was sealed, but a writ of error was taken out in January, 1869.

Geo. P. Hamilton and *John H. Hampton*, for plaintiff in error.

Errors may be assigned in a case of this character even when no exceptions were taken in the court below. Wheeler

*From the report in 2 Weekly Notes of Cases, 330. Phila.: Kay & Bro.

v. Winn, 3 Sm. 122; Mellon v. Hershy, 9 Id. 64; Loew v. Stocker, 11 Id. 347.

[WILLIAMS, J. In Alleghany county it was not the practice formerly, to give a bill of exceptions when entering judgment on a special verdict or a case stated.]

The contract was *ultra vires*, and was prohibited by the general railroad law of 1849. Com. v. N. E. R. R. Co., 3 Casey, 36; McMasters v. Reed, 1 Grant, 36; Miller v. P. & C. R. R. Co., 4 Wright, 237; P. & C. R. R. Co. v. Alleghany Co., 13 Sm. 136; Redfield on Railways, vol. I, p. 223.

A company may take advantage of its own want of power. Fowler v. Scully, 22 Sm. 466.

Geo. Shiras, Jr. and *J. H. Sewell*, for defendant in error.

The company is precluded by the judgment from raising the question of power. Wooster v. Stevens, 1 Ohio, 233; Morton v. Funk, 6 Barr. 483; Samson v. Com., 5 W. & S. 385; Bank v. Lafever, 24 Sm. 52.

As the company would have the right to pay this interest out of its earnings, it will be presumed, after judgment, that their earnings were sufficient for this purpose, the contrary not appearing in the verdict. Kilgore v. Buckley, 14 Conn. 362; Nelson v. Eaton, 26 N. Y. 410; Farmers' L. & T. Co. v. Curtis, 3 N. Y. 470; Roussin v. Ins. Co., 15 Mo. 244; Ins. Co. v. Davis, 12 N. Y. 569.

GORDON, J. The act of the 24th of February, 1853, did but authorize the county of Alleghany, through its commissioners, to subscribe to the stock of the Pittsburgh and Steubenville Railroad Company. It conferred upon the county no power to loan money. To pay for this subscription the commissioners were authorized to issue interest bearing bonds, which the railroad company was required to receive as cash at par. This act, so far from contemplating that the company was to pay the interest upon these bonds, provided that the county commissioners should make provision therefor as in other cases of bonds of the said county. It is therefore obvious that the legislature contemplated an exchange of the stock of the company, as a full equivalent for the bonds of the county, and that the county should occupy no other or better position than other subscribers to the stock of the road. It certainly did not intend that, as to dividends, the county shares should be preferred. When, therefore, the company contracted to pay an annual interest of six per cent. on the county stock, for a period of thirty-two years, it certainly exceeded its authority. If such power existed, we have not been informed of it; and we need no more than repeat the rule, so often expressed in our books, that the powers of a corporation must be found in its charter, or arise by necessary implication therefrom.

This company was incorporated by a special act of assembly, approved March 29, 1849, subject to the provisions of the act of February 19th, 1849, commonly known as the General Railroad Act. This latter recited act not only does not confer the power contended for by the plaintiff below, but in express terms prohibits the exercise of any such power.

The 9th section provides that the "directors shall in no case" (in declaring dividends) "exceed the net profits actually acquired by the company, *so that the capital stock shall never be impaired thereby.*" In case of a violation of the provisions of this section, the directors are made individually liable for the amount of the capital stock so paid out. Now, from the special verdict, we find that the company paid the accruing interest upon the county stock for the years 1854, 1855, and 1856. The road was then unfinished, for from the same source, we discover that, in May, 1856, the road was leased to King & Thompson for the term of twenty-one years, they agreeing to finish the road and pay to the stockholders thereof four per cent. per annum on $1,500,000; subsequently modified to forty per cent. on the gross earnings. King & Thompson afterwards assigned to the Western Transportation Company, but neither of these parties has ever paid anything to the company. It is, therefore, quite certain that the interest paid on the county stock came out of the capital of the company, and it is equally certain that if we compel a further payment it must be drawn from the same source. The special verdict thus exhibits a contract prohibited by the statute, and it follows that it can not be enforced (Fowler v. Scully, 22 P. F. Sm. 456), and, as is said by Justice Agnew in that case, the argument that the state alone can call in question the legality of the act of the company has no place here.

Leaving, however, the act of assembly out of the question, there yet remains the fact that in thus contracting with the county for a bonus on its subscription, the directors of this company were acting without authority. Such being the case, the corporation was not bound. The prime object of the creation of this company was the building of a railroad; an undertaking in which the public was largely interested. It was to be built, if at all, from money subscribed to its stock. If, however, the money so raised must first go to the payment of interest upon these very subscriptions, it is obvious that it would soon be consumed, and thus the main object of the organization defeated. Again, if the county of Alleghany was alone to receive this annual dividend, bonus, or interest, as it may happen to be designated, the remaining shareholders might well complain that the contract is a fraud upon their rights. It is true that those shareholders who assented to the arrangement might be estopped from calling it in question, but as it could not affect such as did not assent to it, or those who subsequently subscribed, an estoppel could not be worked against the company. Bailey v. The Gas, Coal, and Coke Co., 19 P. F. Smith, 340; 1 Red. on Railways, 617.

This court sustained a similar subscription in the case of the Pittsburgh and Connellsville Railroad Company (13 P. F. Smith, 126), only on the ground of an act of assembly authorizing it, and though the contract, like that in controversy, stipulated for the payment of interest for thirty years on the bonds issued by the county in payment of its subscription, yet it was held that such interest was payable only for and not beyond the time specifically fixed by the act, that was until the completion of the road. Thompson, C. J., who delivered the opinion of the court, says: "Without express authority or beyond the limits of authority conferred, we think the company had no power to bind its stockholders, who constituted the company, to pay interest to the county of Alleghany for the period of thirty years, or any other period." This authority being full and to the point, we may rest upon it. In addition to this we may notice the fact that the has no such peculiar equities as would involve the doctrine of estoppel in its favor, even were we in a position to apply it. The county received the same compensation for its subscriptions that others did. It can stand on no higher level, and can ask for no greater consideration than its fellow-shareholders. All got for their money or bonds just what the law contemplated they should get, viz., shares of the company's stock. If it turned out to be worthless as to one, it was worthless as to all; hence there is no reason why the county should be preferred to the individual shareholders. We have been cited to many authorities showing that the misuse or abuse by a corporation of its corporate powers does not necessarily avoid its contracts made under such abuse of authority. These authorities are neither impugned nor doubted; they simply do not apply to the case under consideration, for it is not to be doubted but that not merely a corporation but also any natural person may repudiate a contract executed by an agent without authority. In the case in hand the directors of the Pittsburgh and Steubenville Railroad Company, in executing the contract with the county, acted *ultra vires*, in that they agreed that the county shares of stock should bear interest, and, having so acted, the company may well repudiate that contract.

The judgment of the court below is reversed.

Homestead Defined—Right to Designate, discussed.

HOUSTON AND GREAT NORTHERN RAILROAD COMPANY v. A. WINTERS AND ABERCROMBIE AND WIFE.*

Supreme Court of Texas, February 11, 1876.

Hon. O. M. ROBERTS, Chief Justice.
" GEO. F. MOORE,
" R. A. REEVES,
" ROBT. GOULD,
" JOHN IRELAND, } Associate Justices.

1. Rural Homestead.—The constitution of 1869 exempts from forced sale the rural homestead of a family not to exceed two hundred acres of land.

2. The Homestead is the place where the family reside. It is to be ascertained from facts and not by the variable intention of the head of the family.

3. The Object of the Constitution, is to protect the house, the farm, the mill and whatsoever else is used in connection with the residence to make a support for the family, and not to protect the house with 200 acres of the most valuable land that might be on a large tract.

4. Change of Homestead Lien.—When a lien has been acquired upon land, a party can not change his homestead so as to embrace the land and thereby defeat the lien.

The question in this case is, can a party abandon a portion

* Reported for this journal by Henry Sayles, of the Galveston bar.

of his old homestead and designate other lands as such, if such designation will defeat the rights of other parties previously acquired?

Abercrombie owned in Walker county a tract of 1400 acres of land. It was composed of five surveys, which he had purchased at different times. These surveys were all adjoining, but the land was in somewhat an irregular shape. His house and a large farm were mostly on two of the surveys, and reached only a few yards on the Palmer survey, the land in controversy.

It is not distinctly stated what part of the farm was in cultivation at the time of trial.

The Palmer survey contained 320 acres, and was thin pine land, with the exception of a small field of 30 acres in the north corner, which had been thrown out.

Abercrombie gave to the railroad 100 acres of land out of this survey, describing it by metes and bounds, to locate a depot upon.

There was a mortgage on the whole tract, with the exception of the Palmer survey, for much more than the land was worth. It was not signed by the wife and was executed long after the homestead was acquired. Subsequent to the date of this mortgage one Edwards recovered judgment against Abercrombie. After all the transactions had occurred which we have related, Abercrombie designated a new homestead, and consisted of 157 acres, in the north corner of the Palmer survey, which was all in the pine woods, except the old field of thirty acres. This included the land which he had given the railroad. Added to this was an irregular block, embracing the residence, gin and tan-yard, which is connected with the larger block by a strip 180 varas wide and a half mile long. This small block and the strip contain 43 acres.

Soon after Abercrombie had laid off this land for a new homestead, an execution was issued on the Edwards judgment and levied on the Palmer survey, which was the only unincumbered land at the time of the judgment. The Palmer survey was sold, and the railroad became the purchaser.

At this time Winters held the land as tenant of Abercrombie. The railroad brought a suit of trespass to try title against him, and Abercrombie intervened and set up his homestead rights.

By the charge of the court Abercrombie's right to include the land in controversy in his homestead, was made to depend upon whether he intended thereby to defeat the railroad in the acquisition of the land under the bond, or to appropriate the land in good faith to his own benefit and advantage.

Under this charge the jury found for Abercrombie and the railroad appealed.

In an exhaustive opinion the court hold:

Mr. Chief Justice ROBERTS, delivered the opinion of the court.

The constitution exempts from forced sale "the homestead of a family not to exceed two hundred acres of land." Con. 1869, sec. 15. It was first introduced in the constitution of 1845, and has been reinserted in every constitution adopted since that time.

If the homestead is more than two hundred acres of land, then only that quantity of it is secured; and if it be that or less, then all of it is secured. It is not defined in any of the constitutions, nor is its qualities, attributes or shape expressed, further than in the use of the words "homestead of a family not to exceed two hundred acres." That would imply that it was thought to be something that could be known without any further description. It is a definite, ostensible object to the extent of being the place which is made the home of the family. It has had some legislative interpretation. The act of 1839, in which it originated, described it as "fifty acres of land, or one town lot, including his or her homestead and improvements, not exceeding five hundred dollars in value." Hart Dig. Art. 1270. So, too, the act of 1866 described it as "two hundred acres of land, including his or her homestead."

Homestead is defined to be "the place of the house." "The mansion house with adjoining land." Worcester's Dic.; Bouvier's Law Dic.

It has received judicial interpretation in many respects. "A man's homestead must be his place of residence, the place where he lives." Philleo v. Smalley, 23 Texas, 502.

In the case of Franklin v. Coffee, 18 Texas, 417, Chief Justice Wheeler, in describing what is not a homestead says, "In this case there was no house or home upon the land; he had made no preparation or done no acts which would evince a fixed intention and purpose to select and appropriate the place as a home."

On the contrary, in the caseof Stone v. Darrell, 20 Texas, 15, such acts were done as were said to indicate the intention to appropriate the place as a home, and although not a home literally when levied on, but being such at the sale, it was exempt as a homestead. The use made of land may determine its character as part of a homestead or not, as well as its proximity to, or remoteness from, the residence or mansion house. Prior v. Stone, 19 Texas, 373, 374; Methery v. Walker, 17 Texas, 594. Such use is an object of observation, which indicates, and is notice of appropriation for homestead purposes.

In 1845 most persons who lived in the country were in possession of tracts larger than two hundred acres of land, and generally farms were attached to or situated near their residences. They were of no uniform shape or size, and till then it was deemed a sufficient description of that which was secured to the family out of those large tracts, to call it the "homestead of a family."

The object of the constitution was not to protect the house with two hundred acres of the most valuable land that might be on a large tract, but to protect the house and the farm, tan-yard, mill, gin, or whatsoever had been used in connection with the residence to make a support for the family. This was an object so definite and easy of ascertainment, even though its exact boundaries might not be defined, that the husband was prohibited by law from conveying it away except with the consent of the wife. Every one dealing with the husband had to take notice of its locality on the land. An officer could not levy on it and make a valid sale of it even to one who never saw it or heard of its being the homestead of the family; nor would the matter be mended by its having been pointed out for levy by the husband.

What is meant by "the homestead of a family" in the country and its approximate locality is determinable by obvious facts as a determinate object, and not by the variable intention, privately entertained or openly declared by the husband, he and his wife residing on the land in their home at the time.

Under the same circumstances, when the residence is on a large tract of twelve or fifteen hundred acres most of which being uncleared, the locality of what part of it is not a part of the homestead, is determinable in the same way approximately.

Suppose, for instance, a man residing, with his house and a farm of one hundred acres of land, on the northeast corner of his league of land, the balance all being uncultivated, and not otherwise in use, is it not as certainly determinable by the obvious appearances of fixed facts, that the two hundred acres in the southwest corner of the land is not the locality of a homestead, as that the homestead is located in the northeast corner, where the house and farm are?

Suppose one hundred acres in the southwest corner is levied on, can he defeat the sale by running out an acre around his house, and then running off a strip thirty feet three miles to a block including the balance of the two hundred acres in the southwest corner of the league, and claiming the same as a homestead? If so, the wife can be deprived of the farm, and even of the garden at the door of the house by another levy and sale.

According to the opinion of Chief Justice Hemphill, he could not in such a case even move his house from one corner to the other and claim a homestead, after such a levy. In the case of Stone v. Darrell, 20 Tex. 14, after laying down in the strongest terms that if it is the homestead on the day of sale it is exempt, he says: "This is the general principle. There may be and doubtless are exceptions; as, for instance, when one removes from his former homestead and fixes his residence on a portion of his lands, upon which there had been a levy, such proceeding would be regarded as fraudulent, which might be shown by the purchaser at the sheriff's sale, and would protect his title against the claim of the homestead, thus fraudulently acquired." Such a principle would hardly be conceded as an exception by the great champion of the homestead right, unless it had been good law. In the sale of real property under execution, it is the judgment that gives the lien and secures the right, rather than the levy, which but locates, to be perfected by sale. This is termed by the chief justice an exception to the general rule. It is respectfully submitted that the case he states is the enforcement of a lien that underlies the attempted acquisition of a new homestead, rather than an exception.

If he has plenty of other land to pay the debt, he may exercise the right of pointing out property to be sold, and thereby relieve a particular tract on which there was a judg-

ment lien—there could be no fraud in that. But that would not be a defeat of the lien on the land by a re-location of the homestead.

In the case which was supposed by me of a homestead on the league of land, the house and farm, and the uses made of them spoke a silent language—proclaimed the locality of the homestead to every one. It is a designation of the homestead more authoritative and notorious than lines run through old fields, prairies, or even words by the husband. And if the lines be run in the way supposed, it is no less an attempt to make a new homestead as to its boundaries, than if the house had been moved to the new locality, after the lien had been acquired.

The facts and circumstances surrounding the actual homestead constitute, in and of themselves, a designation of the locality with approximate, though not definitely and exactly fixed boundaries. Under this idea, Chief Justice Wheeler said, in the case of Mackey v. Wallace, 26 Texas, 529, "It would seem, moreover, that it is the right of the debtor to designate the land included in his homestead exemption, subject only to the qualification that he must include his improvements."

Why include the improvements? Because the use of the improvements is the object of a residence in the country, as a means of support, the security of which to every family it was the cherished object of the framers of the constitution to attain by the exemption of the homestead. They enter into and form part of the homestead. As to how much of the improvements, and how much unimproved or woodland may be included in the two hundred acres selected and designated as a homestead, is not subject to any fixed rule, and about which there must be a liberal discretion, limited only by the rights of the wife in the homestead, and by the rights of other persons acquired in the land while it is not part of the homestead.

The question of intention does become important in some points of view; as, for instance, in determining whether or not a person has acquired a homestead at all, as in case of domicil, or whether he has abandoned his homestead, or which one of two houses, where he sometimes resides in each, is his homestead or which of two fields, that are in use, in connection with his rural occupation or calling, is to be preferred, where both can not be, and the like. But when a person is the occupant of a large tract of land with a mansion house, surrounded by, or contiguous to, his farm, which he uses in his calling as a means of support, most of the tract being woodland or prairie, or consisting of a number of tracts, some of which are not used at all, such facts determine substantially and approximately the locality of his homestead, and the locality of portions of the large tracts not so used, to be not his homestead, or part of it, irrespective of his intention at the time. If he should wish to change the locality of his homestead on such large tract, by moving his residence to another portion of his tract, or by changing the boundaries of it, substantially different from the locality, which the pre-existing facts of ostensible use and enjoyment have fixed for him, he must do it before other persons have acquired a right by valid lien, or purchase of such portion of the land as had not been a part of the homestead, and in such manner, by such use or actual designation, as not to permit others to be deceived or entrapped, by the obvious appearances of his ostensible situation on his land. His specific intent, in making the change, either to defraud others, who have rights attached to the land, or to grab from them the most valuable land not previously used for homestead purposes, for his own pecuniary advancement and that alone, is, therefore, not the true test in determining the validity of the claim of homestead.

In the application of these principles to this case, the bond conveyed the right to the land it covered, if, at the time it was given, the said land was not a part of the homestead, as shown by the then existing facts of use and occupation, pertaining to his home and premises; and if the judgment lien was acquired on the said tract, the Palmer survey, when it was no part of the homestead, the defendant could not change the homestead, so as to cover any part of it, necessary for the satisfaction of the judgment, if that tract was the only land out of which the lien could effectually be enforced in the satisfaction of said judgment.

The principles here announced do not necessarily apply to the case of a homestead purchased by one who had none before, against whom valid judgments are subsisting at the time, when the land is clearly made a homestead cotemporaneously with the purchase; nor are they in conflict with the law giving an allowance for a homestead under our probate system to the extent that special provision has been, or may be made, by statute on that subject. Both of these questions are not designed to be precluded from a consideration upon their own merits when they may arise, by the views expressed in this opinion incidentally.

JUDGMENT REVERSED.

Bankrupt Act—Corporations—Number and Value of Creditors.

IN RE LEAVENWORTH SAVINGS BANK.

United States Circuit Court, Second District of Kansas, at Chambers, March 18, 1876.

Before Hon. JOHN F. DILLON, Circuit Judge.

Since the amendatory bankrupt act of June 22, 1874 (18 Stats. at Large, 178), the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy, that is required in the case of natural persons.

In January, 1876, a petition in bankruptcy was filed by a single creditor against the Leavenworth Savings Bank, alleged to be a corporation organized and existing under the laws of the state of Kansas. An order to show cause was issued and served. On the return day, the bank appeared and moved to dismiss the petition because it does not show that it is presented by one or more creditors of the bank, who constitute one-fourth in number and whose debts amount to one-third of the provable debts of the bank. The district court sustained this motion and dismissed the creditor's petition. To reverse this order the petitioning creditor brings the case here by a petition of review.

Clough & Wheat, for the petitioning creditor.

They cited and relied on, *In re* Oregon, etc., Pub. Co., 13 Bankr. Register, 200; Lamp Co. v. Ansonia, etc., Brass Co., U. S. Sup. Court, October Term, 1875; 3 CENT. L. J. 160.

Lucien Baker, for the bank.

DILLON, Circuit Judge—There is only one question in this case, but it is an important one. It is whether under the existing law the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons. Section 37 of the original bankrupt act (sec. 5122 of the Rev. Statutes) made moneyed, business and commercial corporators subject to its provisions, and provided for voluntary and involuntary proceedings the same as in the case of ordinary debtors, except that no allowances were to be made to corporate debtors and no discharges granted. And it is to be observed that this section (§ 37) refers, by the nature of its provisions, to the sections of the bankrupt act, such as section 11, as to voluntary proceedings, and sections 39 and 40, as to involuntary proceedings, and sections 35 and 39, as to frauds, preferences, etc.

By the original act any one creditor whose debts exceeded $300, could throw his debtor, whether a natural person, a co-partnership, or a corporation, into bankruptcy if such debtor had committed an act of bankruptcy. The provisions in this respect as to individual debtors, co-partners and corporations, were uniform. In the fall of 1873 what is known as the panic of that year occurred, which resulted in great distress and embarressment to the monetary and commercial interests of the country. The existing provisions of the bankrupt act, arming a single creditor, in a time of financial stringency with the terrible power of forcing a debtor into bankruptcy, against the wishes and interests of all the other creditors and to the ruin of the debtor, were felt to be too severe, and this led Congress to pass the amendatory act of June 22, 1874. This act breathes but one spirit. All its provisions are in one direction. Every part of it is intended to relieve the severity of the act as it then stood. What should be deemed acts of bankruptcy was modified and in every instance made more liberal towards the debtor. This was done by section 12 which amended section 39 of the original act, by substituting therefor an entirely new section. This new section contained the important requirement, in involuntary cases, that one-fourth, at least, of the debtor creditors representing, at least, one-third of the provable debts, must concur in the proceeding. These provisions were made retroactive in the most comprehensive terms, and the language, in this regard, throws no little light upon the question now under consideration. "The provisions of this section shall apply to *all* cases of *compulsory or involuntary* bankruptcy, commenced since December 1, 1873, as well as to those commenced hereafter. And in *all* cases commenced since the 1st day of December, 1873, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of the petitioning creditors be denied by the debtor," etc., proceed to determine the same, and if the required proportion do not join, "the proceedings shall be dismissed."

It will be observed that no distinction is made or suggested between proceedings against natural persons and proceedings against corporate debtors, but the sweeping language, twice repeated, is "*all* cases," which would include cases against both classes of debtors.

Again, there can be no doubt, as it seems to me, that corporate debtors would be entitled to the benefit of the legislation of 1874 as to what constitutes an act of bankruptcy, and as to what is necessary to make or establish a fraudulent preference. The result then is that many of the provisions of section 12 of the legislation of 1874 do not

apply to corporations. It would be singular if one part of that section applied to corporations and other portions did not; and it would require a clear expression of the legislative intent to justify the court in thus construing the act. It is argued that such an intention is manifested by the language of section 5122 of the Revised Statutes. But this is only a re-enactment with a verbal change of section 37 of the original act, which so far as it allows "*any* creditor" of a corporation without reference to the number and amount of the other creditors to throw the corporation into bankruptcy is inconsistent with the legislation of 1874 and is therefore repealed by necessary implication. While it is true that the amended act and the Revised Statutes were passed on the same day, yet this expressly provided that acts passed subsequent to December 1, 1873, are to have full effect notwithstanding the Revised Statutes. Sec. 5601. The amendatory bankrupt act falls within this provision and there is no ground for claiming that so far as it is in conflict with the Revised Statutes the latter must not give way. Indeed, it will be observed that the amendatory bankrupt act does not refer to the Revised Statutes, but to the sections of the original bankrupt act: can it therefore be contended that it is void since it referred to sections that were then repealed? Surely not; and it is clear that so far as there is any repugnance between the new act and the old the latter must yield.

There is no reason for the alleged difference between the bankruptcy of corporations and natural persons. None had been made in this respect in the original act. Debtors of both classes were within the mischief which the legislation of 1874 was designed to remedy. A large amount of the active business capital of the country is invested in corporate organizations. They largely do business upon credit. Their capital is owned by the shareholders. Creditors as well as stockholders are interested in their successful operation, and bankruptcy is often quite disastrous to both. It can not readily be believed that Congress intended, in a time when it deemed relief from a stringent law necessary, to leave the creditors, and particularly the stockholders in corporations, exposed to its unmitigated severity. It is not the *corporation* that suffers, but its creditors and the owners of its stock.

Again, the original section 39 applied to bankers, bringing them within the provisions as to involuntary bankruptcy; and the amendatory act of 1874, whose effect is now in question, not only allowed bankers to remain subject to being thrown into bankruptcy but added, also, for the first time, the words, "*any bank*," which undeniably means a banking institution owned by a natural person, partnership or joint stock company, and includes in my judgment such an institution when it is incorporated.

This conclusion might be strengthened by other considerations, such as the provisions in the bankrupt act (sec. 48, now section 5013 of the Rev. Stats.) and section 1 of the Rev. Stats., declaring that the word "person" may include and be applied to corporations, but I do not deem it necessary to enlarge the argument. AFFIRMED.

Foreign Judgments—Constructive Notice—Lex Loci.

COPIN v. ADAMSON.

English Court of Appeal, from Court of Exchequer, November 15, 1875.

To a declaration on a foreign judgment the defendant, an English subject, pleaded that he was not within the jurisdiction of the foreign court, and had no notice of the action. The plaintiff replied that the action was brought against the defendant as holder of shares in a company within the jurisdiction of the foreign court, that by the *lex loci* he was thereby bound by all the statutes of the company, that by those statutes any shareholder who should have any litigation with the company must elect a domicile where notices might be served, or in default of election a certain public office should be considered as his domicile, that the defendant made default in choosing a domicile, and that notice of action was thereupon served at the public office. On demurrer,—*Held*, by the Court of Appeal, affirming the decision of the Court of Exchequer, that the replication was good.

Error on the judgment of the Court of Exchequer in favor of the plaintiff on a demurrer to the plaintiff's replication, reported in 22 W. R. 658. The following are the material pleadings:

Declaration by the assignee in bankruptcy of the Societe de Commerce de France (limited), on a judgment for £151 15s., recovered on the 7th of February, 1867, in the empire of France, by him against the defendant in the Court of the Tribunal of Commerce of the Department of the Seine, being a court duly holden, and having jurisdiction in that behalf.

Plea 3.—That the suit was commenced according to the French law, by process and summons, and that the defendant was not at any time previous to the recovery of judgment resident or domiciled within the jurisdiction of the said court, nor is he a native of France, and he was not served with any process or summons, nor did he appear, nor had he any notice or knowledge of any process or summons, or any opportunity of defending himself.

Replication 1.—That before the suit in which judgment was recovered, the defendant became and was the holder of divers shares in a company lawfully existing in France, and being the company in the declaration mentioned, having its seat or place of business and legal domicile at Paris, in the department of the Seine, and within the jurisdiction of the court of the tribunal of commerce of that department; and the defendant then became, and thereby was, by the law of France, subject to all the liabilities, rights and privileges belonging to the holders of shares in the company, and in particular to the regulations, conditions, and stipulations contained in the statutes or articles of association, and by those statutes or articles it was provided and agreed that all disputes which might arise during the liquidation of the company between (amongst others) the shareholders and the company with respect to the affairs of the company, should be submitted to the jurisdiction of the competent tribunal of the department of the Seine, and that every shareholder who should provoke a contest must elect a domicile at Paris, and that, in default of election, election should be made of full right at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses or notice of process should be validly and effectually served at the domicile formally or impliedly chosen; that whilst the defendant was a shareholder the company was declared bankrupt, according to the law of France, and the plaintiff was appointed assignee, and the whole amount unpaid on the defendant's shares became payable to the plaintiff, and the defendant made default in paying, and provoked a contest within the meaning of the statutes or articles: that the defendant never formally elected a domicile at Paris or elsewhere in France, and thereupon the plaintiff, to recover the amount due to him, did, according to the law of France and practice of the court of the tribunal of commerce, cause a summons directed to the defendant to issue, calling on him to appear and answer the plaintiff in an action for the amount unpaid on hir shares; that the plaintiff caused the summons to be delivered for the defendant at the office of the imperial procurator of the civil tribunal of the department where the company's office was situated, that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular, and, by the law of France and practice of the court, amounted to notice to the defendant, then having his real domicile out of France, that he was bound to appear, but did not, whereupon judgment by default was recovered against him.

Demurrer and joinder.

R. E. Webster (*H. Matthews, Q.C.*, with him), for the defendant, contended that as no actual notice had been given to the defendant of the action against him in France he was not liable on the judgment therein. He cited Schibsby v. Westenholz, 19 W. R. 587, L. R. 6 Q. B. 155; Godard v. Gray, 19 W. R. 348, L. R. 6 Q. B. 139; Vallee v. Dumergue, 4 Ex. 290.

Benjamin, Q.C., Holl, and *S. Hastings*, for the plaintiff, were not called on.

LORD CAIRNS, C.—The averments on the replication in this case appear to me to amount to this—that the defendant was a shareholder in a French company: that the statutes and provisions of that company, which in point of fact were agreements *inter socios*, amount to this, among other things, that every shareholder between whom and the rest of the company, or the representatives of the company, any litigation should arise, should choose a domicile in Paris, and if he did not, the the public office there should become his domicile *pro hac vice*, and service of all proceedings at that domicile should be good service on him. The replication goes on to represent that by the law of France a person taking shares and becoming an *actionnaire* in the company was bound by all the statutes and provisions of the company.

The question might arise whether, even without any express averment, by the law of France as that of every civilized country, the shareholder would not be bound by all the statutes and provisions of the company in which he was a shareholder; but that question does not arise here, and I say nothing further about it. The averment here is that, by the law of France, the defendant was bound by all the statutes and provisions of the company.

The court of exchequer have held that the replication is a good one. I am clearly of the same opinion. It appears to me that the parties stand, to all intents and purposes, in just the same position as if there had been an actual and absolute agreement by the defendant, and that, if it were necessary to bring an action against the defendant on the part of the company, the service of the proceedings at the office of the public procurator, if no other plan were pointed out, would be good service.

Therefore the appeal from the judgment of the court below must fail.

BLACKBURN, J.—I am entirely of the same opinion. The replication as it is pleaded and as it is demurred to is sufficient. It is very possible that less might have made a good replication, but as that question does not arise here, I do not say whether less would have been enough.

BRETT, J.—I am of the same opinion.

JUDGMENT AFFIRMED.

NOTE.—The plaintiff in the foregoing case put in two replications to the plea, to each of which the defendant demurred. The court of Exchequer, Kelly, C. B. dissenting, sustained the demurrer to the second replication, but the court was unanimous in overruling the demurrer to the replication above set forth. The second replication was similar to the first except, that instead of alleging that the defendant as a shareholder in the company, was bound by the articles of association, and by reason of those articles was liable to be sued in the French court, it merely alleged that by the law of France, he, as such stockholder, became liable to be sued in the French court under the circumstances stated. Below we give the majority opinion of the court, as reported, L. R. 9 Exch. 345.

AMPHLETT, B.—An important question is raised on these replications, involving the liability of a British subject to be sued in the court of a foreign country. As to the first replication demurred to, the court is unanimously of the opinion that the defendant is shown upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that he would, under the circumstances disclosed, be amenable to the jurisdiction of the court of the Tribunal of Commerce of the department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to show that the defendant's contract is to be governed by French law, still that they do not show that he is subject to the jurisdiction of the French court. The contract must be interpreted by an English tribunal.

Now the plaintiff seems to have thought that all he must allege is that the French law is to govern the contract. But it by no means follows that the defendant has subjected himself to a foreign jurisdiction. The cases which have been referred to, show that before an Englishman can be made amenable to a

foreign court, he must either have an absolute or a qualified, or temporary allegiance to the country in which the court is. He must, as is pointed out by Blackburn, J., in Schlesby v. Westenholz, L. R. 6 Q. B. 155, at p. 161, be a subject of the country, or a resident there when the action was commenced (or perhaps it would be enough if he were there when the obligation was contracted, though upon this point doubt is expressed), so as to be under the protection of, or amenable to, its laws. The learned judge also puts two other cases in which a person might be bound, one where he, as plaintiff, has selected his tribunal, and the other where he has voluntarily appeared before it and takes the chances of a judgment in his favor. The defendant's liability in the latter case, however, is left an open question. I apprehend that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision. It is upon this ground that I decide the demurrer to the first replication in the plaintiff's favor. I think that the defendant must be taken to have agreed that if he did not elect a domicile one should be elected for him; for the articles of association provide for its being done. It is said that it is not sufficiently stated that he had notice of this particular provision, but I think it must be implied that he had notice, from the fact of his becoming a shareholder in the company.

I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process may be served, and that they would be bound thereby.

I confess I can not find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests? Suppose there had been a provision by the law of France that whenever a member neglected to elect a domicile he should pay double calls, are we to enforce his liability in an action on a judgment for such calls obtained against him without his knowledge in the foreign court? No doubt in the present case, where the law of France is in question, the probability is that the shareholder would not be subject to any extraordinary or unjust liabilities. But if the principle of law is that which the plaintiff contends for, it must be applied in cases of countries where the law might be very much more open to objection than it is likely to be in a country such as France.

It is said, however, that the authorities upon the point are decisive, and two were especially relied on. The first was the Bank of Australia v. Harding, 9 C. B. 661; 19 L. J. (C. P.) 345, and it is, I agree, a strong authority in support of the first replication, but not of the second. In that case there had been a local act obtained giving power to the company's creditors to obtain judgment against a representative of all the members, and enacting that by that judgment all the members should be bound; and it was upon the circumstance that the act existed that the judgment of the court was founded, and nothing falls from any of the judges to indicate that they would have held the defendant bound if there had been no such act. In their opinion the defendant was to be considered as a consenting party to the passage of the act, or as one of the parties at whose request it was passed, and therefore bound by its provisions. See per Wilde, C. J., and Cresswell, J., at pp. 685, 687. In the absence of such consent, it seems to me that the court would have come to a contrary conclusion.

The second case relied on was Vallee v. Dumergue, 4 Exch. 290; but here again, although the decision supports the first, it fails to support the second replication. There the defendant had become by transfer the owner of shares in a French company, and upon accepting the shares was bound, according to French law, to elect a domicil. He actually did so, and gave notice of his election to the company. He was, therefore aware of what the French law was, and had complied with it. Then, having left the country, notice of process was as here, left at the elected domicil, but never reached the defendant against whom judgment by default was recovered. It was held he was liable on the judgment, but upon the ground that he had done something more than become a shareholder in the company; he had so conducted himself as to warrant the inference that he had agreed to be bound by the decision of the foreign court. "The replication consists," says Alderson, B. (at p. 303), "of a statement of facts which show that by the agreement to which the defendant has become a party, no actual notice need be given to him;" and again (at p. 303), "it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings, should be bound by a judgment in which that particular mode has been followed, even though he may not have had actual notice of them."

For these reasons my judgment (in which by brother Pigott concurs) is for the plaintiff upon the demurrer to the first replication, and for the defendant upon the demurrer to the second. JUDGMENT ACCORDINGLY.

And to the same effect as Bank of Australia v. Harding, see same plaintiff against Nias, 16 Q. B. 717. But see *contra* Bischoff v. Wetherell, 9 Wall. 812. "The effects of such proceedings are purely local; and elsewhere they will be held to be mere nullities." Sto. Conf. Laws, § 546; Bissell v. Briggs, 9 Mass. 462; Wharton Conf. Laws, § 715. It seems like reasoning in a circle to say that the court can enforce a given contract because it has jurisdiction of the person of the contracting parties, and it has jurisdiction of the person because the contract gives it. The generally received opinion in this country is that before a court can pass upon the rights and liabilities of parties under a contract, so as to affect them *in personam*, the court must acquire jurisdiction of the parties. The rule adopted in England seems to be to decide on the contract first, leaving the question of jurisdiction of the person to depend upon the finding on, and construction of the contract. M. A. L.

Railway Negligence—Fires—Proximate and Remote Cause—Contributory Negligence.

COATES *ET AL.* v. MISSOURI, KANSAS & TEXAS R. R. CO.

Supreme Court of Missouri, October Term, 1875.

Hon. DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

In suit for damages against a railroad company for the burning of a building of plaintiff, caused by the escape of sparks from defendant's locomotive, it appeared that the house was uncompleted and of frame, situated about one hundred feet from the track; that the carpenter had suffered shavings to accumulate about the house, and that the sparks were blown by a high wind from the locomotive into the dead grass adjoining the track, and from thence fire was communicated to the shavings and the building. *Held*, as follows: 1st. The escape of the fire from the engine was the proximate cause of the damage, and proof of its escape established a *prima facie* case of negligence which would render the company liable. But to rebut such presumption defendant might show its employment of careful and competent servants, and use of the best contrivances to prevent the escape of fire. Such facts being shown, it devolved upon plaintiff to prove actual negligence on the part of defendant. 2nd. In accumulating combustible material plaintiff and defendant were equally negligent, and plaintiff could not recover on that score. See Fitch v. Pac. R. R., 45 Mo. 322.

Appeal from Henry County Circuit Court.

Jno. Montgomery, Jr., for appellant; *Ladue & Tyke*, for respondents.

NAPTON, J., delivered the opinion of the court.

This action was to recover damages for the burning down of a building in the town of Ladue, by the escape of fire from one of the locomotives of defendant. The basis of the action was negligence and unskillfulness on the part of the employees of the company, in setting fire to the dead grass near the house. The house was a one story frame building, not entirely finished, situated about one hundred feet from the track. It was about twelve o'clock in the day when the fire occurred, and the wind was very high and blowing from the track towards the town. The grass near the track was dry (it was the middle of October), and in front of the house was a workbench, surrounded with shavings.

The plaintiffs proved that the fire was started by coals or cinders from engine No. 25.

The defendant then introduced witnesses who stated that the engineer and fireman of No. 25 were competent, skillful, reliable and careful officers, and that engine No. 25 was a first class engine in all respects and supplied with every improvement, down to the latest, for preventing the escape of fire. The master mechanic stated that it was impossible to run an engine without keeping the dampers open; "that the ash pan was immediately under the grate, and the motion of the train shakes the ashes and coals through the grate into the ash pan, and the dampers are at each end of the ash pan, and of course when opened the wind sweeps the fire out of the ash pan on the track." The witness stated that no mode has ever been devised as yet to prevent this, and that fire must escape from the best of engines.

The court gave the following instructions at the instance of the plaintiff:

1. The court instructs the jury on the part of the plaintiff, that the fact of fire escaping from the defendant's engine, lighting upon and igniting the dead and dry grass, and other combustible matter, suffered by the defendant to accumulate upon its right of way adjoining plaintiff's property in the town of Ladue, and, by spreading, communicated to plaintiff's property and destroyed the same, are facts from which the jury may infer negligence on the part of defendant's agents, officers and servants, and leaves the burden of exonerating them on defendant.

2. It is the duty of every man so to use his own property as not to cause injury to that of his neighbor, and the fact of fire escaping from the engine of a railroad company and communicating to the property of others is a fact to be considered by the jury in determining the question of negligence on the part of defendant. And if the jury believe from the evidence that the defendant, its officers, agents or employees negligently permitted fire to escape from the engine of defendant, and that it communicated to and destroyed or consumed the property of plaintiffs, as alleged in the petition, they will find for plaintiffs and assess the damages at such sum as the jury may believe from the evidence the store was reasonably worth.

3. The court instructs the jury on the part of the plaintiff, that the defendant in the case was bound to a degree of care and dilligence in proportion to the degree of damage, and the probable extent of injury to the property of others in case of negligence, and if the jury believe from the evidence that the defendant, its agents or servants or employees failed to exercise that degree of care and caution which they might have done under the circumstances, in consequence of which fire escaped from the engine of the train in their use, and communicated to and burned the property of the plaintiff, as alleged in the petition, then they will find for the plaintiffs.

4. The question whether the injury sustained was too remote or consequential, is for the exclusive determination of the jury, and the fact of the house being situated some distance from the railroad track of defendant will not prevent a recovery on the part of plaintiffs, if the jury believe it was one continuous fire from the place where it ignited in the grass to the house.

5. The court further instructs the jury that the question of negligence and carelessness on the part of the defendant, its agents, servants, etc., is a fact to be determined by the jury from all the evidence.

6. The court instructs the jury that although the plaintiffs have been guilty of some negligence in suffering the shavings to accumulate around the storehouse, which may have contributed remotely to the destruction of their property, yet if the defendant's agents or employees, or either of them, was guilty of negligence in suffering the dead and dry grass to accumulate upon the right of the way, or unlawfully to provide good and suitable contrivances for the prevention of the escape of fire from the engines, or in using or managing the same, and that such negligence on the part of the agents and employees was the immediate cause of the burning, and that with the exercise of prudence on the part of such agents and employees, the fire might have been prevented, then the defendant is liable in the action, and the jury will find for the plaintiffs.

All of which instructions were given by the court, to which defendants duly excepted.

The defendant prayed the court to instruct the jury as follows, viz:

1. The court instructs the jury that negligence is a fact to be proved like any other fact, and before the plaintiffs can recover in this action they must prove affirmatively to the satisfaction of the jury that the

defendant was guilty of negligence in setting the fire which consumed the house of plaintiffs.

2. There is no conclusion or presumption of negligence on the part of defendant because fire escaped from the engine.

3. If the jury find from the evidence that the high winds prevailing on the 7th day of October, 1871, were the immediate cause of the destruction of plaintiff's building, and that but for the high winds and dry condition of the grass and the shavings which had been suffered to accumulate about or around said building, the same would not have been burned, then the defendant is not liable if the jury find that the fire did escape from defendant's engine or train of cars, without negligence on the part of defendant or its employees, or defects in the machinery.

4. The inference that because fire escaped from defendant's engine it was guilty of negligence, may be fully rebutted by the defendants showing, to the satisfaction of the jury, that it used the best machinery and contrivances to prevent such a result, and that careful and competent servants were employed by it; and if this inference of negligence is overcome by the evidence of defendant, before the jury can find for the plaintiffs, they, the plaintiffs, must prove affirmatively other acts of negligence of defendant.

5. Although the jury may find from the evidence that the defendant permitted the grass on the right of way to remain in its natural condition, yet if they find that the plaintiffs suffered the grass around and about their house to remain in a similar condition, and unless they had allowed it to so remain they would have suffered no injury, they cannot on that account recover of defendant, unless the jury find further that the fire was set negligently by defendant.

All of which instructions the court refused to give and the defendant properly excepted. The court of its own motion then gave the following instructions:

1. The court instructs the jury that negligence is a fact to be proved like any other fact, and before the plaintiffs can recover in this action, they must prove affirmatively to the satisfaction of the jury that defendant was guilty of negligence in setting the fire which consumed the house of plaintiffs, or in permitting the dry grass to remain on its property.

2. Before the jury can find for the plaintiffs, they, the plaintiffs, must prove affirmatively acts of negligence of defendant.

To the giving of which defendant at the time properly excepted.

The only question discussed in this court relates to the propriety of the instructions. The rules of law relating to the liability of railroad companies in losses occasioned by fires, are thoroughly discussed by Judge Bliss in his opinion in the case of Fitch v. Pacific R. R. Co., 45 Mo. 324, and from the conclusions reached by the court in that case we are not disposed to depart, and the circuit court in the present case seems to have had in view the principles settled in the case of Fitch. But examining the instructions in connection with the proof offered, two objections have been taken which we think require a reversal of the judgment. The first objection relates to the question of contributory negligence on which an instruction (No. 6) was given for plaintiffs.

Abstractly considered, the instruction is undoubtedly the law, but on the facts in evidence it may have been calculated to mislead. Judge Bliss observes in the case of Fitch, that where the *gravamen* of the charge of negligence consisted in defendant allowing the grass to accumulate on the track, it was competent for defendant to show that the plaintiff had suffered a similar accumulation, and that without it he would have suffered no injury: "Both causes," observes the learned judge, "were equally remote, and the proximate cause was an accident, and one could not, with a good face charge the other with a specific neglect of which he was also guilty."

In the present case the plaintiff's house was only about a hundred feet from the railroad track. It was not completed, and the carpenter suffered the shavings to lie around the house, which were just as combustible as the adjoining grass. One would suppose that persons building so close to a railroad would see that no excuse of this sort should be offered to the company in case of fire. It appears that no contrivances can utterly prevent the escape of fire, and if the railroad company ought to have the grass under and around the track burned, so ought the persons who are so immediately on the road to take the necessary precautions. Of course, a farmer who lived two or three miles off might not reasonably be expected to apprehend danger, but every case depends on the peculiar circumstances attending it, and the object of courts, trying such cases, should be to apply general principles to the facts of the particular case being tried.

But the main objection to these instructions is the refusal of the court to give the fourth asked by the defendant, after giving the first asked by plaintiffs. When it is proved that the fire escaped from an engine of defendant, a *prima facie* case of negligence is established, and this was so declared in the first instruction given for plaintiff. But to rebut that inference which is declared in the case cited to be a reasonable one, the "defendant should show that the best machinery and contrivances were used to prevent such a result, and that careful and competent servants were employed."

Evidence to this effect was given in this case, (whether satisfactory to the jury or not, is not material,) but if the jury believed it, then it devolved on the plaintiff to show something more than the mere escape of fire from the engine and the destruction of his house by this fire, which only made out a *prima facie* case. The burden of proving actual negligence then devolved on him, and this is really so declared to be the law in the instructions given by the court of its own motion; but as the court had at plaintiff's instance given a specific instruction in regard to what constituted a *prima facie* case, the instruction No. 4, asked by defendant in regard to what would rebut it, should have been given. The jury was liable to be misled by such abstractions.

The judgment will be reversed and the cause remanded; the other judges concur.

NOTE.—The above case will aopear in the 61st Missouri Reports at page 36. The excellent syllabus above given is by the official reporter, Mr. Post. For a learned and philosophical discussion of this question, by Dr. Wharton, see the *Southern Law Review* for January, 1876.

Copyright in Foreign Dramatic Compositions—Play of "The Two Orphans."

SHERIDAN SHOOK *ET AL.* v. A. McKEE RANKIN *ET AL.*

Circuit Court of the United States, District of Minnesota, Saint Paul, September 16, 1875.

Before Hon. RENSELLAER R. NELSON, District Judge.

A preliminary injunction was applied for to restrain the performance by the defendants of a play called "The Two Orphans." Upon the bill and affidavits the court found: *First*. That there has been no *memorization of this play* by the defendants or any body in their employ, which would entitle them without authority from the complainants to represent the play of "The Two Orphans" in this district. *Second*. That there has been *no dedication* by any voluntary act, which would prevent the complainants in this case from exclusively representing this play. *Third*. That the *prima facie* case made out by the bill has not been overcome by the affidavits which have been presented by the defendants; and thereupon the court awarded a preliminary injunction as asked.

Motion for a preliminary injunction to restrain the performance by the defendants of the play called "The Two Orphans."

W. P. Clough and *L. F. Post*, of counsel for the complainants, for the motion.

J. H. Davidson, counsel for the defendants, opposed.

*NELSON, J.—It is important that there should be a speedy decision of this motion; and while delay would perhaps enable me to present my views more elaborately, and satisfactorily to myself, it would not change the result I have arrived at, and I shall, therefore, proceed to announce my decision in this matter, giving my reasons for it briefly. I think that upon an examination of this case, it will be found that no new principles are involved.

The complainants, Messrs. Shook and Palmer, allege that they are owners of the copy-right of a certain play, entitled, "The Two Orphans," derived from an assignment to them by one N. Hart Jackson, who is alleged to have obtained this copy-right under the laws of the United States; and they charge the defendants, enumerating them in their bill, with an infringement of their rights in this copy-right, to-wit: that they are now and have been presenting the play copy-righted as aforesaid, and assigned to the complainants, in the city of Saint Paul, in this district, without any authority or license. That is, briefly, the substance of the bill; and upon it, accompanied by the certificate of copy-right and additional affidavits, they ask that a preliminary injunction be granted by this court.

The complaint has attached to it, (and the original has been presented,) a copy of the certificate, duly issued in accordance with the laws of the United States, to N. Hart Jackson, and a proper assignment from Jackson as the author or proprietor, to the complainants.

They also present with their bill of complaint, the affidavit of N. Hart Jackson, which more in detail sets forth his right to obtain from the government this copy-right, alleging that he is the joint author of this play with some French citizens, and the purposes for which the joint production was translated into English, for exhibition in this country.

Now, there is no question if all these allegations are true, and if it shall be established on the final hearing in this cause that the copy-right was legal and valid, that the complainants would be entitled to an injunction.

Upon the face of the papers which they present here, they have established what in law is termed a *prima facie* case, and the burden is thrown upon the defendants, who are charged with an infringement of their right to overcome it.

This is valuable property. It has been said that dramatic compositions are the most valuable of all literary works, and there is some reason in it. While authors of literary productions, as a general thing, are compelled to await the printing, manufacture and sale of their books before they can derive any profit from them, the dramatic manuscript can be readily put on the stage, and if it is an amusing and entertaining production, and well brought out, it immediately becomes a source of profit. If it has a successful run, this profit and value are increased, so that it seems to me the assertion is true in some respects, that the authors of literary dramatic compositions are entitled to the great protection which has been accorded to them by the copy-right laws of this country, for the reason that they are the most valuable of literary compositions.

Have the defendants overcome the *prima facie* case which has been established here by the complainants? One of the defendants only, A. McKee Rankin, has put in an answer under oath. He has accompanied his answer with a voluminous affidavit setting forth more in detail the defences which he alleges in his answer to overcome the *prima facie* case established on the part of the complainants; and in order to defeat the application which is made here, and other affidavits, some of them the affidavits of the co-defendants, and of other parties, relating to other portions of the answer, have also been introduced and read. The defences which are set forth relate, first, to the right of the complainants

to the exclusive representation of the play entitled "The Two Orphans;" second, to the authorship which is set forth as belonging to N. Hart Jackson, the immediate assignor of complainants; and so far as the affidavits are concerned, these defenses may be classed as follows:

First. That the representation of this play is made from a version obtained from memory, and consequently its representation upon the stage in the Opera House in this city is not an infringement of any rights of complainants.

Second. That the complainants themselves have dedicated to the public any rights which they obtained in the assignment to them.

Third. The denial of authorship in N. Hart Jackson, who is set forth in the bill of complaint as the proprietor, and joint author with two Frenchmen.

Now, so far as the first line of defence is concerned, let us examine it.

It has been claimed, and with some reason, that the presentation of the version of a play obtained by process of memory is an infringement of no rights, either of the author, or of his assignees; and in a very early case, it will be found upon examination that Justice Buller decided in England, that where the version of the play had been obtained by frequent attendance upon its representation, and afterwards produced by the party, it was not an infringement upon the rights of the author, and an injunction was refused. It was refused upon this principle: That a court of justice can not enjoin the memory of a man; that where a party by mere strength of memory was enabled to commit a play and all its parts, and afterwards write it out without any assistance from the original play itself, it was the exercise of memory alone, and a court would appear ridiculous in attempting to enjoin the memory of a man. It was regarded at the time as a novel precedent; still it has been undisturbed, and a case was decided I think in New York city upon that principle; see article by J. A. Morgan in American Law Register, April, 1875, where Lester Wallack commenced a suit against Barney Williams, some six or seven years ago. He produced upon the boards of his theatre the celebrated play of "Caste," and a short time afterwards Barney Williams also produced the play of "Caste" in another theatre, much to the astonishment of Mr. Wallack, and of everybody else who were informed of the means by which Mr. Williams obtained possession of the play, and of his rights in the premises. Upon suit being instituted by Mr. Wallack, claiming under the common law right, and not under any copyright, it appeared that the brother-in-law of Barney Williams, Mr. Florence, in his affidavit, testified that he had obtained possession of this play by a process of memory. From frequent attendance at the performance in Mr. Wallack's theatre he had been enabled to obtain possession of the play, and had actually produced it; which seemed an extraordinary exertion of bare memory, as it was, undoubtedly, if true.

When that affidavit was presented, the court in New York declined to grant an injunction, following the precedent laid down in the English case.

Now without discussing the question whether the right of property—the right of an author in his property—depends upon any peculiar process, which may be used in obtaining it from him without his voluntary act, I think that even assuming that a court of equity would not interfere in a case of that sort, this is not the mode in which the version used by defendants was obtained, according to the allegations of the answer. They do not claim that this version which is represented here was obtained by frequent attendance upon the play, and listening to it; but they aver that by familiarizing themselves with it when represented, they being leading actors in the representation, it was memorized. They were not listeners, they were not a portion of the audience, but were persons who had been engaged by the managers who brought out the play, and obtained all they knew by repeating it as actors.

So far, therefore, as this defence is concerned, the facts do not bring it within the rule laid down by Justice Buller, even admitting that the decision is founded upon true principles of equity.

Second. Have the complainants in this cause, by any voluntary act, dedicated to the public the right to use this drama, and thus abandoned all exclusive rights as the assignees of the person who obtained the copyright? I see nothing in the defence which would show any publication of this play within the legal meaning of that term as applied to copyrights. What are the facts?

It appears that the complainants authorized the publication of a novel, or what is called an adaptation of "The Two Orphans," in the form of a book, which was purchased by Monroe & Co., in New York. There is no pretence here that Messrs. Shook & Palmer authorized the publication of the drama, with all its gestures, stage entrances scenic effect, as they were representing them upon the stage of the Union Square Theatre, but they entered into a contract by which they gave to Monroe & Co. authority to publish a novel founded upon the incidents of this drama which they were representing; and it appears from a hasty examination which I made yesterday of the copies presented, that they are substantially the same. It may be admitted that by authorizing this publication founded upon the drama, the complainants dedicated to the public the right to the novel. The question then is, whether the publication of a novel founded upon this drama which is the original act, is an abandonment of the right to exclusively represent the drama? I think the case cited by counsel for complainants in the English reports (Reade v. Conquest, 11 Common Bench, N. S. 479), conclusively establishes the fact that where the drama is the original literary effort, and the novel is based and founded upon the drama, its publication is not such a dedication to the public as will authorize the novel to be dramatised and put upon the stage without the authority of the persons owning the copyright to the original literary effort.

Third. I come now to the last defence, that is, the one attacking the copy-right. Have the defendants overcome the *prima facie* case established by the complainants? It is alleged in the answer upon information and belief, that D'Ennery and Cormon, two Frenchmen, are the authors of the play, and not Jackson, and, in order to sustain that allegation, the affidavit of Vandenhoff has been read. He testified that long prior to the taking of the copy-right, but not prior to the allegation in the bill, Jackson was joint author with the Frenchmen, and he saw an English version of "The Two Orphanss" which was in all particulars substantially the same as the play, upon the stage in two theatres in London. This version of the play is not produced.

There is an allegation in the affidavit of Mr. Rankin, that he expects to produce it; but upon this preliminary motion there is nothing but the mere naked testimony of Vandenhoff that he saw in the London theatres a representation of this play, substantially as played by Shook & Palmer in the Union Square Theatre. Does that overcome the *prima facie* case charged and alleged in the bill? I think not. If the answer, or affidavits had been accompanied by a copy of this English version of the play, and set forth who was the author of the same, it might present a different case, and lead to a different result.

Now, what is the rule in equity governing a court where a preliminary injunction is asked? The general rule is (and this case presents no exceptions), where the act charged in the bill is either admitted, or not denied—and here the act charged in the bill is the representation of this play—and the injury which results is not easily remedied if the injunction is refused, a court of equity will grant an injunction unless the bill or the case made out by the bill is absolutely refuted.

This is the rule in equity which governs a court in all cases where a preliminary injunction is asked for. It may be that on the final hearing of the case, when all the evidence has been introduced on the part of the defence, and on the part of the complainants, the court will decline to grant the relief which is prayed for: but it is impossible upon a preliminary application of this kind to decide upon the merits. The complainants at final hearing may not show themselves entitled to the permanent relief which they claim, but they ask that so long as they have established a *prima facie* case, and their right to this property, that a restraining order or a preliminary injunction shall be granted.

Without further elaborating this case, I have arrived at these conclusions:

First. That there has been no memorization of this play by the defendants or anybody in their employ which would entitle them, without authority from the complainants, to represent the play of "The Two Orphans" in this district.

Second. That there has been no dedication by any voluntary act which would prevent the complainants in this case from exclusively representing this play.

Third. That the *prima facie* case made out by the bill has not been overcome by the affidavits which have been presented by the defendants.

It follows, therefore, necessarily, that an injunction must issue, restraining the defendants from representing the play of "The Two Orphans."

INJUNCTION AWARDED.

Measure of Damages.

DOW v. HAMBERT *ET AL.*

United States Supreme Court, October Term, 1875.

In an action against the supervisors of a town for failing to place upon the tax list the amounts of certain judgments which the plaintiff had recovered against the town, and of which he had given the supervisors notice, it is held that, in the absence of any proof of actual damage, and since the taxable property still remains subject to the judgment, the plaintiff is entitled to no more than nominal damages.

Error to the Circuit Court of the United States for the Western District of Wisconsin.

Mr. Justice MILLER delivered the opinion of the court.

The defendants are sued by plaintiff for a failure to perform their duty as supervisors of the town of Waldwick in the county of Iowa, Wisconsin, in refusing to place upon the tax list the amounts of the judgments recovered by him against that town. By the statutes of Wisconsin, no execution can issue against towns on judgments rendered against them, but the amounts of such judgments are to be placed, by order of the supervisors, on the next tax list for the annual assessment and collection of taxes, and the amount so levied and collected is to be paid to the judgment creditor, and to no other purpose.

The declaration avers due notice served on the supervisors of these judgments, and demands that they be so placed on the tax list. The first judgment is described in the declaration as rendered in the circuit court for the district of Wisconsin, on the 27th of October, 1870, for $708.90; and the notice to the supervisors, set out in the declaration, uses the same language. The other judgment is described as rendered in the circuit court for the western district of Wisconsin, June 10, 1871, for the sum of $1,531.56.

The answer of the defendants denies that there is any such judgment as that first described. And as to the second judgment, they say that after it was rendered the town of Waldwick was divided, and a part of it organized into the new town of Moscow: that thirty-seven per cent. of the judgment was collectable from that town, and that it was not the duty of the defendants to levy the whole judgment on the property of the citizens of Waldwick.

On these issues the parties went to trial before a jury. In support of

the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties, for the same amount, and of the same date as that described in the declaration, in the circuit court for the eastern district of Wisconsin, to which defendants objected because it varied from the judgment described in the declaration, and in the notice given to defendants to place it on the tax list. The court sustained the objection, and this ruling is the ground of the first assignment of errors. The argument of counsel on this branch of the case rests mainly on the ground of the sufficiency of the notice to the supervisors. But the question before that is whether such a judgment was admissible under the pleadings as they stood. There had been for many years a circuit court for the district of Wisconsin. Shortly before this judgment was rendered the district was divided into two districts, and the circuit courts were by the express language of the act of Congress called the Circuit Court for the Eastern District and the Circuit Court for the Western District respectively. There was no such court in existence at the date of the judgment offered, as the Circuit Court for the District of Wisconsin, and the defendants were justified in pleading *nul tiel* record to a declaration founded on a judgment of that date in that court. And on this issue as it stood when the record of a judgment in the circuit court for the eastern district was offered, it did not prove a judgment in the circuit court for the district of Wisconsin.

If plaintiff had asked leave to amend his declaration by inserting the word *eastern* before district in his first count, in describing his judgment, it would no doubt have been granted, and the question would then have arisen as to the sufficiency of notice to the supervisors, the notice containing the same mistake. But on the plea of *nul tiel* record of judgment of the circuit court for the district of Wisconsin, it is clear a judgment of the circuit court for the eastern district of Wisconsin is not evidence of such a judgment.

Plaintiff having introduced a record of his judgment for $1,531.56 in the western district of Wisconsin, and notice and demand as to that to the supervisors, the defendants were permitted, as the court said, solely in mitigation of damages, to offer the record of the division of the township and resolutions of the board, adopted after this suit was brought, directing the town clerk to place this latter judgment, with its interest, on the tax list in November, 1872, to which exceptions were taken, and this constitutes the ground of the second and third assignments of error. They will be considered in connection with the fourth and last assignment.

This being all the testimony, plaintiff requested the court to charge the jury that the plaintiff was entitled to recover of the defendants the amount of both these judgments, with interest from their date; and this being refused, he asked the same instruction as to the second judgment, which was refused. Exceptions were taken to both these refusals, and to the following language in the charge which the court did deliver:

"The jury are instructed upon the whole evidence in the case that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax-roll of the town."

The whole case turns upon the soundness of this latter instruction, representing as it does the converse of that which the plaintiff asked and which was refused. And the single question presented is whether these officers, by the mere failure to place on the tax list, when it was their duty to do so, the judgment recovered by plaintiff against the town, became thereby personally liable to the plaintiff for the whole amount of said judgment, without producing any other evidence of loss or damage growing out of such a failure.

It is not easy to see on what principle of justice the plaintiff can recover from defendants more than he has been injured by their misconduct.

If it were an action of trespass there is much authority for saying that plaintiff would be limited to actual and compensatory damages, unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable that, for a failure to perform an act of official duty, through mistake of what that duty is, plaintiff should be limited in his recovery to his actual loss, injury, or damage?

Indeed, where such is the almost universal rule for measuring damages before a jury, there must be some special reason for a departure from it.

In the case before us it must be presumed that the taxable property of Waldwick township remains to-day as it was when the levy should have been made; that a levy this year would as surely produce the money as if it had been made last year. The debt is not lost. The right to recover remains. The property is liable to its satisfaction and the means of subjecting it to that use are still open to plaintiff. The only loss, then, is the delay, unless it may be the cost and expense of the unavailing effort to have the debt levied on the tax of the previous year; and this, if proved, could have been recovered under the instructions. For mere delay in paying a moneyed demand, the law has long recognized interest as the only damages to be recovered, and this interest is by law added to the assessment when placed on the tax list. If A, by the highest class of express contract, say a promissory note or bond, promise to pay B ten thousand dollars on a day fixed, and fail to do it. B can only recover interest for the delay, though he may have depended on that money to save his homestead from sacrifice, and has lost it by reason of that failure. So a man buying real estate may improve, adorn, and have it grow in his hand to a value ten times what he gave for it. But if he loses all this by a failure of his title, he can only recover of the warrantor the sum which he gave for the land. These are apparent hardships. But wisdom and experience have shown that the danger of holding persons liable for these remote consequences of the violation of their contracts is far more serious in its consequences than occasional failure of full compensation by the application of the rule of interest for delay, and of the purchase money in a suit on a warranty of title to lands.

"Damages," says Mr. Greenleaf, "are given as a compensation, recompense, or satisfaction to the plaintiff for any injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less, and this, whether it be to his person or estate." 2 Greenleaf's Evidence, sec. 253. And without entering into the question whether this rule excludes what are called exemplary damages, which are not claimed here, we think this definition of the principle on which damages are awarded in actions of law, a sound one.

The expense and cost of the vain effort to have the judgment placed on the tax-list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that and would accept no less.

Counsel for plaintiff relies mainly on the class of decisions in which sheriffs have been held liable for the entire judgment for failing to perform their duty when an execution has been placed in their hands. The decisions on this subject are not harmonious; for while it has been generally held that on a failure to arrest the defendant on a *capias*, or levy an execution on his property, or to allow him to escape when held a prisoner, the amount of the debt is the presumptive measure of damages, it has been held in many courts that this may be rebutted or the damages reduced by showing that the prisoner has been re-arested, or that there is sufficient property subject to levy to satisfy the debt, or other matter showing that plaintiff has not sustained damages to the amount of the judgment. This whole subject is fully discussed and the authorities collated in Sedgwick on Damages, pp. 506–525. Richardson v. Spence, 6 Ohio, 13. But without going into this disputed question we are of opinion that those cases do not furnish the rule for the class to which this belongs.

The sheriff, under the law of England, was an officer of great dignity and power. He was also custodian of the jail in which all prisoners, whether for crime or for debt, were kept. He had authority in all cases, when it was necessary, to call out the whole power of the county to assist him in the performance of his duty. The principle of the sheriff's liability here asserted originated, undoubtedly, in cases of suit for an escape. Imprisonment of the debtor was then the chief, if not the only mode of enforcing satisfaction of a judgment for money. It was a very simple, a very speedy, and a very effectual mode. The debtor being arrested on a *capias*, which was his first notice of the action, was held a prisoner, unless he could give bail, until the action was tried. If he gave bail, and judgment went against him, his bail must pay the debt, or he could be re-arrested on a *capias ad satisfaciendum*, and if he had given no bail, he was holden under this second writ until the money was paid. To permit him to escape was in effect to lose the debt, for his body had been taken in satisfaction of the judgment. Inasmuch as the object of keeping the defendant in prison was to compel the payment of the debt through his desire to be released, the plaintiff was entitled to have him in custody every hour until the debt was paid.

It is also to be considered that for every day's service in keeping the prisoner the sheriff was entitled to compensation by law at the hands of the creditor. Williams v. Mostyn, 4 M. and W. 153; Williams v. Griffith, 3 Exch. 584; Wylie v. Bird, 4 Q. B. 566; 6 id. 468.

With the means in the hands of the sheriff for safe-keeping and re-arrest, with the escape of the debtor, almost equivalent to a loss of the debt, and with compensation paid him by plaintiff for his service, it is not surprising that when he negligently or intentionally permitted an escape, he should be held liable for the whole debt.

How very different the duties of the class of officers to which defendants belong, and the circumstances under which their duties are performed. There is no profit in the office itself. It is undertaken mainly from a sense of public duty, and if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from holders of judgments and other claims against the town for the collection and payment of their debts. There are no prisons under their control, no prisoners committed to their custody, no *posse comitatus* to be brought to their aid. But without reward, and without special process of a court to back them, they are expected to levy taxes on a reluctant community at whose hands they hold office. To hold that these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertence or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished.

The case of The King, at relation Parbury, v. The Bank of England, Dougl. 524, is cited as sustaining the plaintiff in error. It was an application for a *mandamus* to compel the governor and company of the Bank of England to transfer stock of the bank. The writ was denied on several grounds, among which, as a suggestion, Lord Mansfield said that "where an action will lie for complete satisfaction (as in that case), equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *man-*

damus." He then shows that the right of the party in that case to have the transfer made was not clear. As this was not an action against the officers of the bank for damages, the remark that there was other relief is only incidental, and the point as to the measure of damages was not in issue.

A note to the principal case shows that an action of assumpsit was afterward brought and compromised before final judgment. But on the whole case there is no discussion of the measure of damages; and that question remained undecided. The case of Clark v. Miller, 54 N. Y., 528, decided very recently in the commission of appeals, appears to be more in point. It was an action against the supervisor of the town of Southport, Chemung county, for refusing to present to the Board of Supervisors of the county plaintiff's claim for damages as reassessed for laying out a road through his land.

The court, without much discussion of the principle, holds the defendant liable for the full amount of the reassessment, on the authority of The Commercial Bank of Buffalo v. Kortright, 22 Wend. 348.

Bills and Notes—Fraudulent Alteration—Negligence of Maker—Bona Fide Holder.

GERRISH v. GLINES.*

Superior Court of New Hampshire, August 13, 1875.

Bills and Notes—Fraudulent Removal of a Condition.—Where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper,—*Held*, that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition by tearing the paper, was such a material alteration as rendered the note void in the hands of a *bona fide* holder.

Assumpsit to recover the amount of two promissory notes, each dated July 15, 1872, and payable to O. J. Stickles & Co., or bearer, one for $66.74, six months from date with use, and the other for $250, one year from date with use, and each signed by the defendant. The action was sent to a referee by order of court, who at this term makes report that he finds due from the defendant to the plaintiff the amount confessed, and no more; and he reports his conclusions of facts and law as follows: "The plaintiff's writ is dated March 11, 1874, with general count, and the two notes above described were specified as plaintiff's claim, sought to be recovered in this suit. The defendant confesses the first note for $66.74; and as to the second note described for $250, says he never promised, etc. Reference to the writ, specification, plea, and confession on file may be had. The plaintiff read said notes and put them in as evidence, and rested his case; on the back of said note for $66.74, is written and crossed as follows:

"Demand notice waived.
LEONARD GERRISH."

The other note, for $250, was written on the back, "Demand notice waived. Leonard Gerrish." The defendant offered to prove, did prove, and I find that when said defendant made and signed said note of $250, there was written on the same paper with said note, and under the defendant's signature to said note, and signed by said defendant and the payee of said note, the following, to-wit: "Condition. This note is given on the following conditions:—W. F. Glines, of the first part, agrees to work his territory faithfully and well, and O. J. Stickles & Co. of the second part, agree if W. F. Glines, of the first part, does not make one thousand dollars over and above what he pays for said territory, then the above note is void and of no effect. (Signed). O. J. Stickles & Co. W. F. Glines."

The plaintiff's counsel objected to the evidence of this condition, without showing first that the plaintiff had knowledge of it at the time he took or purchased said note. The evidence was ruled in, notwithstanding the objection, and the plaintiff took exceptions to said ruling. It appeared from cross-examination of the defendant, that he did not "work all his territory faithfully and well," according to said condition, and from the plaintiff's testimony, without exception, that when he purchased said note, no such condition was annexed to said note, and that he had no knowledge of this condition or agreement at that time, and that he paid a fair and full consideration for said note.

I find that said condition had been torn off, and before the plaintiff purchased said note. And I rule, under the foregoing facts, that such alteration avoided the note in the hands of an innocent endorsee; and that the plaintiff can not recover said note in this suit under any view.

The questions of law thus raised were transferred to this court for determination by FOSTER, C. J.

Barnard, for plaintiff; *Pike & Blodgett*, for the defendant.

LADD, J.—Upon the facts found by the referree in this case, I am of opinion that his conclusions of law were correct, and that there should be judgment on the report accordingly. It is claimed by the plaintiff, in effect, that the note and the condition written below it on the same piece of paper are to be regarded as evidence of two distinct contracts, and treated as two separate instruments. I think that view can not be sustained. The memorandum is entitled "condition," and its first words are, "*This note* is given on the following conditions," etc. It seems to me beyond all question that the condition is one part of a single, entire contract, of which the note is the other; that the whole paper together must be treated as a single instrument, and that any division of it whereby a negotiable promissory note, which had no legal existence before, was created, was such a material alteration as rendered the whole void; that it was, in fact, no less than a forgery, which would render the note thus brought into existence altogether void, even in the hands of a *bona fide* holder who paid a full consideration for it before maturity. The authorities in this state and elsewhere, establishing the rule as to the effect of a fraudulent and material alteration or forgery of a negotiable promissory note, are too numerous and too familiar to require citation. My conclusion is that the plaintiff can not recover the $250 note for both the reasons given by the referee.

CUSHING, C. J.—The note for $250, when issued by the defendant, was qualified by a condition annexed to it, and referring to it in such mode as to show that it was intended to remain attached to it so long as it was in force, and probably until it was detached by consent of the defendant. The payment of the note was then dependent upon a contingency, and therefore the note was not negotiable. Fletcher v. Blodgett, 16 Vt. 26; Fletcher v. Thompson, 55 N. H. 308, and cases there cited.

Independently, therefore, of the effect produced upon the note by a material alteration, it is enough for this case that the action can not be maintained in the name of this plaintiff. When the note was issued by the defendant it was not negotiable, and could not be made so without his consent. It appears to have been altered by tearing off the condition, after it came into the possession of the original payee. It is not, therefore, the note which the defendant gave. He has a right to say *non in hæc fœdere veni*, I did not make this bargain. It is plain enough in reason as well as in authority that the endorsee in this case is in no better condition than the original payee. The maker of a *negotiable* note is bound hy that note as he makes it, and against an innocent endorsee his defences are much restricted; but it is only the note which he actually made, and not a different note which binds him in this way.

The case of Johnson v. Heagan, 23 Me. 329, is an authority to show that the removal of the written condition was a material alteration. It is not necessary, perhaps, to consider any further the effect of this alteration in avoiding the note. The cases Master v. Miller, 4 Term 320, 2 H. Bl. 141; Burchfield v. Moore, 25 Eng. L. & Eq. 123; Gardner v. Walsh, 32 Eng. L. & Eq. 162; Davidson v. Cooper, 11 M. & W. 778; 18 Id. 343; Powell v. Divett, 15 East, 29, seem to show conclusively that the effect of such an alteration, made after the acceptance of the bill or giving the note, would be not only to avoid the note in the hands of an innocent endorsee, but also, if fraudulently done, to discharge the debt. Gibbs v. Linabury, 22 Mich. 479; Benedict v. Cowden, 49 N. Y. 396.

SMITH, J.—The principle, that the fraudulent removal of a memorandum originally attached to a note and qualifying the contract, constitutes a material alteration and destroys the note, is well established. Benedict v. Cowden, 49 N. Y. 376, and authorities there cited. The plaintiff is entitled to recover the amount confessed, and costs to the date of the confession, and the defendant is entitled to recover costs since that time.

JUDGMENT ACCORDINGLY.

NOTE.—The foregoing opinion is wholly inconsistent with the doctrine recognized in Citizen's National Bank v. Smith, 3 CENT. L. J. 163; 55 N. H. 593. In that case it was said that "the defendant can not be held by virtue of any actual contract or promise is very clear, because he never made any contract; but that he should be estopped by his own negligence from denying, as against an innocent holder for value, the usual legal effect of his signature to a negotiable instrument, or be discharged from liability for the proximate consequences to such innocent holder of his own negligent act, seems to be equally clear both upon reason and authority." In the one case the defendant "never made any contract," but he was held liable on the instrument as the maker of a negotiable promissory note, because of his negligence in signing the instrument without first ascertaining its true character; in the other case the defendant did intentionally execute a negotiable promissory note subject to a condition thereunder written destroying its negotiability, and which condition could be readily detached from the note, and yet the court holds that inasmuch as the note was non-negotiable when made, it could not be made negotiable even in the hands of an innocent holder for value before maturity, by detaching the condition, notwithstanding the negligence of the maker in so executing the note as to invite a fraud upon innocent endorsees. Or, in other words, one by his negligence may be estopped to deny the execution of a negotiable note where he in fact never made any note at all; but, if he did make one, no amount of negligence will estop him from showing that the note was non-negotiable—his negligence may make a note out of the whole cloth, but can not vary the effect of one he does make.

Not one of the cases cited in the principal case is authority for the conclusion reached therein, and it is contrary to all well considered authorities both English and American.

In Johnson v. Heagen, the plaintiff had removed the memorandum.

In Master v. Miller, the date of a bill of exchange had been changed after acceptance.

The only question in Burchfield v. Moore, was whether inserting a place of payment in a bill of exchange after acceptance, and without the knowledge or consent of the acceptor was such a material alteration of the bill as to discharge him, and it was held that it released him. No blanks were left in the bill, and the question of his negligence did not arise in the case.

Gardner v. Walsh was a case where the plaintiff had procured a party to sign a note as security without the knowledge or consent of one who had previously signed it as security. *Held*, such an alteration as to release the security who signed first. There was no question of negligence or good faith in the case.

In Davidson v. Cooper a seal had been affixed to the defendant's signature to a guaranty while in the plaintiff's hands.

Powell v. Divett was an action on a bought and sold note which had been altered by the broker after the bargain had been made, at the instance of the seller without the consent of the purchaser. *Held*, that the alteration avoided the note in the hands of the seller.

Gibbs v. Linabury was a hay-fork note case, similar in most respects to Citizen's National Bank v. Smith, *supra*, and the only material differences in the two cases is that in the Michigan case, the court found that the defendant was induced *without negligence on his part* to sign the note, thinking it was a contract constituting him an agent for the sale of machinery.

*To be reported in 55 N. H. 9.

In delivering the opinion in Benedict v. Cowden, the court expressly declared that it did not pass upon the effect of the defendant's negligence in executing the note. The court said: "The question whether the defendant by his act, negligent or otherwise, enabled the payee to commit the forgery and perpetrate a fraud upon an innocent purchaser of the note, and if so, as to the effect of such negligence, or any want of proper care upon his liability upon the note as altered by the severance of the memorandum, was not raised at the trial, and can not therefore be made on this appeal. The only questions at the trial were those now disposed of, to-wit: Whether the memorandum was a part of the note, and the legal effect of its destruction without the assent of the maker."

But this question afterwards came before the court for adjudication in Chapman v. Rose, 56 N. Y. 137, 1 CENT. L. J. 242, and it was said that the doctrine contended for in the principal case would be a premium on negligence; that to protect the integrity of commercial paper, it is necessary "to hold firmly to the doctrine that he who by his *carelessness or undue confidence* has enabled another to obtain the money of an innocent person shall answer the loss."

In Phelan v Moss, 67 Penn. St. 59 and Zimmerman v. Rote, 74 Penn. St. 188, the parties signed perfect promissory notes, attached to which were conditions which, as between the parties were a part of the contracts, and destroyed their negotiability. But because these conditions could easily be separated from the contract, leaving a perfect note, it was held in each case as a matter of law that the maker was guilty of such negligence as would estop him from setting up the condition to render the note non-negotiable in the hands of an innocent holder who purchased before maturity, and after the condition had been severed from the note. This doctrine was re-affirmed in Brown v. Reed, 3 CENT. L. J. 83, where the court said: "We mean to adhere to these cases as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is, *that if the maker of a bill, note or check, issues it in such a condition that it can easily be altered without detection, he is liable to a bona fide holder who takes it in the usual course of business before maturity.*

In Young v. Grote, 4 Bing. 258, 13 Eng. Com. L. 490, where the plaintiff had left blank checks on a bank with his wife to be filled up and used for certain purposes, and the wife, through inexperience in such matters, filled one of the checks in such a manner that it could be easily altered by increasing the amount, and delivered it in such condition to a clerk, who increased the amount of the check and drew the money thereon, it was held that the husband was liable to the bank for the full amount of the check, because of his negligence in leaving an inexperienced person to fill out the blank.

In Harvey v. Smith, 55 Ill. 224, where a note written partly in ink and partly in pencil was in suit, Breese, J., delivering the opinion of the court, said: "If a person signs a note written partly in ink, but containing a material condition qualifying his liability, written only in pencil, he is guilty of gross carelessness, and if the writing in pencil is erased so as to leave no trace behind, or any indication of alteration, as it easily may be, we are of opinion, an innocent holder, taking the note before maturity, for a valuable consideration, will take it discharged of any defense arising from the erased portion of the note, or from the fact of alteration."

In Abbott v. Rose, 62 Maine, 194, where the defendant had signed an instrument in blank thinking it an order for machinery, the court said: "But assuming that the payee of this note has been guilty of forgery in filling up the blanks, as he is claimed to have done, it does not follow that the defendant is free from responsibility in the matter. * * * * * * If, then, this act resulted from negligence, or want of due care on the part of the defendant, however innocent he might be, he would be responsible to any person equally innocent with himself who is injured by that act."

In Rainbolt v. Eddy, 34 Iowa, it was held that "since the defendant by executing a note, and delivering it with a blank in it for the insertion of interest, and thereby placed it in the power of the payee to do the wrong, as between him and the plaintiff, a *bona fide* purchaser for value, he ought to suffer any loss resulting therefrom, and to the same effect see Visher v. Webster, 8 Cal. 109; Trigg v. Taylor, 27 Mo. 245; Ivory v. Michael, 33 Mo. 398; Pressburg v. Michael, Id. 542; Gillaspi v. Kelley, 41 Ind. 158; Isnard v. Torres, 10 La. Ann. 103; Garrard v. Hodden, 67 Penn. St. 82; Bank v. Smith, 5 Ohio, 222; Schryver v. Hawkes, 22 Ohio St. 398; Yocum v. Smith, 63 Ill. 321. A different conclusion was reached in Washington Savings Bank v. Ecky, 51 Mo. 272, but as the decision was made on the authority of the Missouri cases heretofore cited, and was in direct conflict therewith, its authority is not very great, and, besides, the doctrine of Bank v. Ecky and Briggs v. Ewart, decided at the same term, has been expressly overruled. Shirts v. Overjohn, 2 CENT. L. J. 423.

In Holmes v. Trumper, 22 Mich. 427, the rule asserted in Bank v. Ecky was adopted, but none of the authorities cited by the court in support of the rule lead to any such conclusion, and the same may be said of Waite v. Pomeroy, 29 Mich. 425. In this last case the authorities cited are not even reasonably in point. In only one of them (Burchfield v. Moore, 25 Eng. L. & Eq. 123, 3 E. & B. 663), did the rights of an innocent holder come in question, and in none of them was there any negligence on the part of the party sought to be charged.

Decisions in contravention of long established and most equitable principles, and wholly unsupported by the authorities upon which they profess to be based, are entitled to very little respect. M. A. L.

Book Notice.

BIGELOW ON ESTOPPEL, SECOND EDITON.—A treatise on the Law of Estoppel, and its application in Practice. By MELVILLE M. BIGELOW. Second edition. Boston: Little, Brown, and Company. 1876.

In the year 1872, the first edition of Mr. Bigelow's Treatise on Estoppel was published. It met a decided want upon a topic of great and growing importance, and was received, as it deserved to be, with favor by the profession. Its striking merits consisted of an introductory analysis, or *coup d'œil*, of the entire field, an admirable division of the subject into parts and chapters, and a full and careful collection of the cases, giving in most instances the very language of the judges. There can be no doubt that the plan adopted was, in view of the mass of material and the conflict in the decisions, the best possible for the purposes both of the lawyers and the judge. Text writers may and often do largely aid in bringing order out of confusion by systematic and philosophical treatment of a legal topic. But the most useful books in the outset are those which gather the decisions, and give the reasoning of the judges in connection with the particular facts. It was the admirable collection of cases upon evidence, of Cowen and Hill in their notes to Phillips on Evidence, which made Greenleaf's systematic treatise possible. And, even now, for the practising lawyer and earnest judge, though not for the student, these notes are the better reading, and for all the richer mine for thorough investigation. The publication of leading cases with notes collecting all the authorities bearing upon the same theme, which has been a characteristic of the last quarter of a century, is a form of compilation of like order. It is the study of the cases themselves which enables the student to ascertain legal principles, and their application to the complicated occurrences of the actual. One striking merit of the original edition of our author's treatise was that it gave us all the leading authorities on the subject, with such a statement of the facts as to enable us to see for ourselves the practical application of the principles enunciated or discussed.

The new edition, while retaining all the merits of the first, has some decided improvements. The longer discussions of some of the judges are now transferred from the text to the notes, thus enabling the reader to follow the thread of the subject more closely, if he is only reading for the purpose of gathering general principles, or to pursue it in its details, if his object requires profounder research. There has been a lopping off of matters of surplusage, a closer connection of the propositions considered, and more attention to the historical development of his theme. Quite a number of authorities have been added, some of them tending largely to clear up pre-existing doubts, and to define more accurately the previous floating boundary line. To this class belongs the cases of Thompson v. Whitman, 18 Wall. 457, and Knowles v. Gas Light Co. 19 Wall. 58, mentioned by the author in his preface. They settle by the highest court what was long a mooted point, that the recital of jurisdictional facts by the record of the judgment of a sister state is only *prima facie* evidence of jurisdiction, and may be shown to be untrue.

Nothing could be clearer or more satisfactory than the mode in which our author divides and discusses his theme. He separates into three great heads, each of which we know developed itself historically in the order adopted: Estoppel by Matter of Record, Estoppel by Matter of Deed, Estoppel by Matter in Pais. The fourth division of Pleading, Practice, and Evidence, is, of course, complemental to the others, and properly falls under the same original headings. The subdivisions of the parts into chapters are equally natural, and exceedingly convenient.

We have given this new edition a careful perusal, tempted by interest in the theme and the mode of treatment, and, perhaps, we ought to add, by the beauty of the typography, and can cordially recommend it to our professional brethren. It is characterized by discriminating analysis, exhaustive collection of the decisions, clearness and terseness of language, and sound thought. W. F. C.

Notes of Recent Cases.

Right of Action of Next of Kin for Death of Relative.—The Supreme Court of Ohio in *Groten Kemper v. Harris*, (25 Oh. St. Rep. 510,) *held:* 1. Under the act requiring "compensation for causing death by wrongful act, neglect, or default," etc., persons who had no legal claim for support upon the deceased may, as next of kin, have an action maintained for their benefit, to recover the compensation allowed by the statute. 2. In such cases, in determining the pecuniary injury resulting from the death, the reasonable expectation of what the next of kin might have received from the deceased, had he lived, is a proper subject for the consideration of the jury.

Husband and Wife as Witnesses—Objection to Testimony—Wife's Separate Estate—Right of Creditor over Debtor's Property.—The Supreme Court of Ohio in *Westerman, et al. v. Westerman*, (25 Oh. St. 500) *held:* 1. Under the amendatory act of April 18, 1870 (67 Ohio L. 113), husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person. 2. And the act is applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the act of February 19, 1866, (S. & S. 1), declaring the effect of repeals and amendments. 3. Evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court and not for the jury, and, on error, will be presumed to have been given to the court, unless the contrary appears. 4. Where a motion is made to exclude the entire testimony of a witness, part only of which testimony is incompetent, without specifying any particular part of the testimony objected to, or disclosing the ground of objection, it is not error in the court to overrule the motion. 5. Under the act of May 1, 1861, (S. & S. 389), as amended March 23, 1866 (S. & S. 391), the separate property of the wife is *primarily* liable, as between her and the husband, for the satisfaction of judgments recovered in actions brought against them upon causes existing against her at their marriage; and the husband, when compelled to pay any such judgment, becomes, in equity, a creditor of the wife to the amount paid, and entitled to charge the same upon her separate property, and for that purpose to set aside fraudulent conveyances thereof made in contemplation of marriage. 6. A creditor may avoid or set aside a fraudulent conveyance of his debtor's property for the satisfaction of his debt, without first exhausting the debtor's other property, or showing that the debtor has no other property liable to be taken.

Constitutional Law—Acts to legalize Assessments—Legislature cannot deny to Officers of Municipal Corporation Discretion concerning Municipal Improvements.—The Supreme Court of California, in an opinion delivered by McKinstry, J., in the case of *People v. Lynch* (3 Am. L. Times Rep. N. S. 127), decided that an assessment that could not have been directly levied by the legislature of a state, cannot be legalized by an enactment of such legislature; nor has the legislature of a state the power to deny to the officers of a municipal corporation the discretion which they enjoy under the charter of the municipality concerning municipal improvements. Our space will not permit the giving of the opinion in full, but we extract the following points: "The action is an alleged assessment for planking Tenth Street, from J. to N. streets in the city of Sacramento. As conclusions of law,

the court below found that the order of the board of trustees directing the grading and planking was *void*, because the board did not acquire jurisdiction to make it; that the contract for planking was also void, and that the assessment was void, because the same was not made in pursuance of the city charter. The court further found that all the proceedings had been *legalized* by the act of the legislature, approved March 30th, 1874, 'to legalize the assessment of a street tax in the city of Sacramento.'" * * * "For the purpose of the present case, I am willing to admit the entire accuracy of the rule said (by Cooley) to be applicable to statutes passed to cure irregularities in the assessment of property for taxation. 'If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity of which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute.' Cooley's Const. Lim. 371. Passing the questions made below as to the *identity* of the assessment which the act attempted to validate, the district court erred in holding that the act legalized the illegal proceedings. And this for three reasons: *First*. The assessment which it attempted to legalize was entirely wanting in the elements of equality and uniformity, according to any standard or system of apportionment, and therefore could not have been directly levied by the legislature. As I understand it, the court below distinctly found that a lot of land, within the district declared by the charter and law to be benefited by the alleged improvement, was not assessed at all. Assuming that the act (in connection with the charter an attempted assessment) is to be read as if it, in terms, declared that public work had been done, which was of benefit to the same property which would have been benefited if the work had been regularly ordered, it assesses all the lots within the district benefited, except certain lots which it releases from liability for the benefit received. An 'assessment' for a local improvement is a *tax*, differing from other taxes in that it need not be levied upon the *ad valorem* principle. Although such assessment is not prohibited by that clause of the state constitution which provides that 'all property shall be taxed in proportion to its value,' it is of the very essence of taxation, *in every form*, that it be levied with equity and uniformity, and to this end, that there should be some system of apportionment. Taylor v. Palmer, 31 Cal. 240. These assessments may be apportioned by reference to the number of feet fronting on the improvement, or to any other standard which will approximate exact equality and uniformity; but whatever the basis of taxation, the requirement that it shall be uniform is universal, the difference being only in the character of the uniformity. The terms 'tax' and 'assessment' (except in the case of specific taxation), both include the idea of some ratio or rule of apportionment, so that, of the whole sum to be raised, the part paid by one piece of property shall have some known relation to, or be affected by, that paid by another. Woodbridge v. Detroit, 8 Mich. 276; People v. Mayor of Brooklyn, 4 N. Y. 419." [See also Weeks v. Milwaukee, 10 Wisc. 256]. * * * "In the present case (whatever may be the rule as to executive officers, such as assessors, charged with duties ministerial in their character) it is unnecessary to go further than this: The constitutional limitation that taxation shall be equal and uniform, including the proposition that by the law levying it, it shall be a burden upon all property similarly affected, or in the same relation to the purpose of the tax and to the taxing power, applies with full force to the action of the legislature. While, therefore, if a law shall provide for a tax in conformity to the constitution, errors in judgment on the part of the agents appointed to assess (or even intentional omissions) may not invalidate the whole levy; an attempt by the legislature to release certain property from its proportion of the tax would be of non-effect." * * * *Second*. "The power of 'assessment' cannot be directly employed by the legislature within the limits of any incorporated city. In Taylor v. Palmer, *supra*, it was said: 'It is true that the power of assessment is vested in the legislature, but it is so in a modified sense. It is not so vested as an independent or principal power, like that of taxation, but as a part of, and as an incident to, the power of organizing municipal corporations, and providing for them a system of government, to the proper working of which the power of assessment is indispensable. It was not intended that the power of assessment should be exercised by the legislature, and it never can be, except through the intervention of a municipal corporation; for, whenever the legislature undertakes to exercise the taxing power directly, it works under the power of taxation as distinguished from that of assessment.' And again: 'It results that the legislature not only may grant, but must grant, to one of its creatures a power which it is not permitted to exercise in its own capacity, or, to observe greater exactness, the privilege of exercising the power of taxation for certain purposes in a mode in which the legislature is forbidden to exercise it;' p. 251. The foregoing language is to be construed with reference to the facts of the case then before the court. The learned judge who delivered the opinion in Taylor v. Palmer was discussing the power of 'assessment' *within a city*, and the conclusion was, that within corporations strictly municipal, the power cannot be directly exercised by the legislature. Thus construed, the case of Taylor v. Palmer accords with the subsequent ruling in Hagar v. Supervisors of Yolo (47 Cal. 234), where it was held that, outside of such municipalities, the legislature might authorize the employment of the power by local boards." The learned judge then concludes that, as the state constitution permits the legislature to restrict the power of assessment "so as to prevent abuses" in the same, "it is a power which, from its very nature, can only be prudently employed by those in whom it is exclusively vested," and hence "can only be exercised through the medium of the corporate authorities." * * * *Third*. "The inhabitants of a city cannot be deprived of their right to have such matters passed upon by their representatives in the city council as are placed by the charter under the supervision and control of the legislative department of the city government. The legislature cannot, in a special case, deny to the proper city authorities that discretion which they may ordinarily employ with respect to local improvements." * * *

"It is undoubtedly true, in a certain sense, that the state constitution is to be construed as a *limitation* upon and not as a grant of legislative power; that is to say, the general power of making laws having been placed by the people in the legislature, the legislature will be held to have the power to make any law which it is not prohibited from making by the constitution of the state, or of the United States. In this respect the rule of interpretation is the reverse of that applicable to acts of Congress under the Constitution of the United States. But the 'Sovereignty of the people' is more than a meaningless phrase.

"The people of California created the state government, and it was for this people to place (in the state constitution) as many checks upon, and conditions and limitations of the general grant of legislative, executive, or judicial power, as they deemed proper or expedient. 'The people of the state alone possess and can exercise supreme and absolute authority; the legislature, as the other departments of government, are but the depositories of delegated powers more or less limited,'—according to the terms of the constitution. 1 Sharswood's Black. Com. ch. 2, note.

"The constitution of California is more than a collection of suggestions or 'directory' clauses as to the employment of the powers of legislation by a body, which, like the Parliament of Great Britain, is omnipotent. It purports to contain, and does provide, an entire framework of government. It divides the powers of this goverment into three departments, no one of which is freed of the restrictions declared or necessarily implied from the instrument as a whole. We are to ascertain the meaning of the constitution by an examination of all of it; and in making such examination, effect is to be given, if possible, to every section and clause. It is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. Cooley's Const. Lim. 58. The real question in the construction of the constitution, as in the construction of a statute or of a contract, is, what is meant by the language employed? We should read it with a view to finding out the *thoughts intended to be expressed*." * * * "Bearing in mind the principles of construction above mentioned, I proceed to enquire, what did the framers of our constitution mean, when, after declaring in general terms that the law-making power should be vested in the Senate and Assembly, and requiring the establishment of a system of county and town governments, they further provided:—'It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrain their power of taxation, * * * so as to prevent abuses, etc.' Art. 4, sec. 37. 'Each county, town, city, and incorporated village shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe.' Art. 11, sec. 9. * * *

"A system of territorial subdivisions and municipal organizations existed in California when our constitution was adopted. But a very large majority of the inhabitants of California, as well as of the members of the convention, were recent immigrants from states where the common law prevailed as the basis of jurisprudence, and it was to the cities and villages, there in operation, that reference was made in the clauses of the constitution. The convention used the terms as they had been used throughout the United States, when employed at all; and the very idea of an American city involves the notion of a local government; of local officers selected by the inhabitants, and reflecting the wants and wishes of the inhabitants; and that these officers should exercise their own judgments in respect to the internal affairs committed to their charge by law of their creation. The legislature can alter or repeal a city charter, but it does not follow that the legislature can deprive the aldermen, councilmen, supervisors, and trustees of a city of all discretion in the discharge of their functions as such." * * * "The state legislature may perhaps provide for an enquiry, in the first instance, into the propriety and feasibility of a project affecting exclusively the interests of the people of a city by persons or officers other than members of the local legislature. There may be no serious objection to this, provided the action of such persons is merely advisory. But the definite and ultimate determination, which shall conclude the tax-payers of a city, must be that of the appropriate local legislature. This question was fully considered in the *People v. Common Council of Detroit*, 28 Mich. 228. The legislature of Michigan had passed an act appointing a board, who by the terms of the law had absolute power to purchase lands for a park in the city of Detroit, and on whose report the common council were commanded to make provision to pay for the land, by issuing bonds, &c. The supreme court of that state held the law to be unconstitutional, as being an attempt to transfer to a board appointed by the legislature a discretion which the common council alone could be authorized to employ." * * * "An attempt by the state legislature to order an improvement within the limits of an incorporated city, and to levy an assessment to pay for it, is as clearly a violation of the independence of action guaranteed by the constitution to the local legislative assembly, as a mandate directed to that assembly, commanding them to make such improvement, and to borrow money, or to tax all, or a portion, of the citizens to pay for it, contrary to the wish of the assembly, and to that of the local community whom they represent. Such a law is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees, or legislative department of the city government by whatever name it be known, of all choice or discretion in reference to the improvement."

—Hon. A. O. P. Nicholson, Chief Justice of the Supreme Court of Tennessee—an able and upright judge—is dead.

Legal News and Notes.

—THE *Gazette des Tribunaux* announces the death at Paris, on the 10th of last month, of M. Legagneur, honorary president of the Court of Cassation. M. Bedarrides, the Advocate-General, in announcing the event in court, took occasion to pay a tribute to the legal knowledge and high character of the deceased.

—IN the State Senate of South Carolina, March 21st; Montgomery Moses, judge of the seventh circuit, was found guilty of high crimes and misdemeanors and formally dismissed. The committee to investigate the case of C. W. Butts, of the Charleston circuit, made a majority report that he was guilty of high crimes and misdemeanors and recommended impeachment.

—SOME time ago the Hon. Job E. Stevenson read before the Bar Association of Cincinnati, a paper on the Supreme Court of the United States. The paper was published in the *American Law Record*. From it we gather the following: The business has grown gradually from small beginnings to great magnitude. The first term was held in New York city, February, 1790, when Chief Justice Jay, Justices Cushing, Wilson, and Blair, and Attorney-General Randolph were qualified. A clerk was appointed and rules adopted. At the August term, 1790, Justice Iredell was qualified. At the February term, 1791, held in Philadelphia, a number of counsellors and attorneys were admitted. At the August term, 1791, the first judicial action was taken—hearing a motion to require a defendant to respond to a writ of error issued out of the Circuit Court of the United States for the Rhode Island district. The court refused the motion, holding that the writ should issue direct from the supreme court. The attorney-general moved for a commission to examine witnesses in Holland; opposing counsel consented, but the court refused the order until the commissioners were named. At the February term, 1792, in the case of Oswald v. New York, counsel moved for a *distringas* to compel the appearance of the state, but while the court was considering the matter the motion was withdrawn. At the August term, 1792, Justice Johnson was qualified and the case of Georgia v. Brilford was decided, being the first judgment. At this term the court passed upon an act of Congress, requiring the circuit courts to hear claims for pensions, holding the act unconstitutional, because it imposed executive duties on the judiciary. At the February term, 1793, two cases were decided, one establishing the right of a citizen of one state to sue another state; opinions were pronounced by all the judges. At the August term, 1793, Justice Patterson was qualified in the "room" of Justice Johnson, resigned; and we are told that the "malignant fever," then prevailing in Philadelphia, interrupted the business so that "no important case was agitated." At the February term, 1794, two cases were decided; in 1796, six cases were decided; in 1797, seven; in 1798, five; in 1799, nine; in 1800, nine—forty decisions in eleven years. In 1802 the court was removed to Washington. In the preface to 1 Cranch, published in 1804, the reporter says: "Much of that uncertainty of the law which is so frequently and perhaps so justly the subject of complaint in this country, may be attributed to the want of American reports." There were then three volumes containing decisions of the supreme court. Few decisions of circuit and district courts had been published, and probably not more than forty volumes of American reports were extant. Now the decisions of the supreme court fill over eighty volumes; those of the circuit and district courts more than a hundred, and those of state courts more than two thousand, and they are coming fifty volumes a year, containing thousands of cases. Whatever "uncertainty of the law" remains can hardly be attributed to the "want of American reports." The Supreme Court of the United States has decided more than five thousand cases, and is deciding from one hundred to three hundred annually. Over two hundred and thirty-four were decided at the December term for 1873. A few men has done this work; only forty justices occupying the bench in eighty-five years. The court was organized with a chief justice and five associates—four a quorum. The act of 1807 provided for six associates; that of 1837 for eight associates—six a quorum. The act of 1863 provided for nine associates, making a bench of ten—six a quorum. The act of 1866 provided that no vacancies in associate justiceships should be filled until the associates should be reduced to six, which should thereafter be the number, and four a quorum. The act of 1869 restored the number of associates to eight, making a bench of nine, of whom six are a quorum. Doubtless the general purpose of these has been to provide for increasing business, but if the acts of Congress be studied in connection with the condition of parties, the state of the Union, the mortuary record, and that of resignations and appointments, the query will suggest itself whether there may not have been motives for some of these acts, not set forth in the debates. Such questions come up most naturaly when we consider the reduction in 1866, the increase in 1869, and the fact that there were no appointments made, or practicable from 1865 to 1869. The service of the justices has generally been prolonged, that of the majority ended only with life. Twenty associates have died in office, and the average of their terms of service was nearly twenty years. Justice Catron served twenty-eight years, Justice Johnson thirty years, Justice Washington thirty-one years, Justice McLean and Justice Wayne each thirty-two years, Justice Story thirty-four years. Three chief justices have died in office after serving an average of thirty-four years. Chase nine years, Taney twenty-eight and Marshall twenty-four years. Six of the justices now serving have been on the bench over twelve years, one seventeen. Three justices resigned after long service; Justice Duval of twenty-four years, Justice Grier of twenty-four years, and Justice Nelson of twenty-seven years. Is there something in the office which prolongs life? Or have the men been of rare vitality? Probably both. Two chief justices and ten associates have resigned, which tends to show that where the tenure is long and certain, there is less disposition to hold office. The appointment as justice has been three times declined—that of chief justice twice. Levi Lincoln, of Massachusetts, was nominated as justice and declined; then John Quincy Adams, of Massachusetts, was nominated and declined, and thereupon Joseph Story, of Massachusetts, was appointed. If Lincoln or Adams had accepted there might have been no Justice Story. John Jay, the first chief justice, resigned, and during a recess of the Senate, John Rutledge was nominated and presided at the August term, 1795, and in December following the Senate rejected him. Justice Cushing, the senior and presiding associate was nominated and unanimously confirmed chief justice, but with singular modesty he declined and remained an associate. Oliver Ellsworth was appointed chief justice, and in February, 1799, resigned. In December, 1800, John Jay was re-nominated and confirmed, but preferring private life, declined, and thereupon John Marshall was appointed. But for these resignations and declensions there might have been no Chief Justice Marshall. Justice Cushing may be said to have been succeeded by Marshall to whom he gave place, and when he died, he was succeeded as justice by Story. Had every other man two such successors? This modest, self-denying judge seems to have been twice entrusted with the keys of the temple of justice, and to have delivered them to men chosen of heaven. The term of office is during good behavior, which is practically for life. Impeachment is the only method of removing a judge, and that is not effective save in a clear case. It has been applied against a justice of the Supreme Court but once, and then failed. In that case the charge did not involve conduct on the supreme bench, but related to proceedings on the circuit. A recent act of Congress provides that if a judge who has served ten years and reached the age of seventy years, shall resign, the compensation shall continue during his life. Under this act two justices, Grier and Nelson, have resigned. The compensation was originally fixed at $3,500 per annum for the justices, and $4,000 for the chief justice. The rate has been increased four times, and is now $10,000 for the justices and $10,500 for the chief justice. These sums, with the privilege of resigning on the salary, make the most liberal compensation provided for any judges in the country. It may be greater than the people fully approve, but as the constitution forbids the diminution of the compensation of a judge during his term, any reduction could only apply to judges thereafter appointed, and that would establish two rates of compensation, which is deemed objectionable, as tending to promote jealousy and discord. The act of 1789 organizing the court, provides that "the associate justices shall have precedence according to the date of their commissions; or, when the commissions of two or more of them bear date of the same day, according to their respective ages," and so the law remains. The justices assemble, and after drawing their official robes around them, move, the chief justice first, and the associate justices in the order of their precedence, to the chamber of the court in solemn procession, with measured step and slow. The clerk stands by, and bows almost to the floor to each judge as he passes on, and when the chief justice appears in the court room, the members of the bar rise and stand until the justices are seated. The chief justice presides, or, in his absence, the justice next in rank. Strict decorum is preserved, the court according courtesy and requiring respect, but there is rarely occasion for discipline. The presence preserves order. It is said that once a counselor rose to address the court in his overcoat. On being checked, he apologized and removed the surplus garment. If this is true, it appears to conflict with another case when the court smiled at the appearance of an eccentric "western" lawyer in his wamus, but there may have been circumstances in the manner of the offenders to distinguish the cases. The court works in a good place under good rules in good temper. The chamber is in a small, crescent-shaped room in the capitol, near the rotunda. The bench is raised and crosses the straight side. Within the bar are seats for a score or so of counselors, and outside sofas for as many spectators. The rules give opportunity for full hearing, without exposing the court to imposition or the parties to delay. The time for argument is limited to two hours on each side, unless extended for cause shown before commencing. Only two counsel can be heard on either side. In 1812 a counselor gravely moved the court for a construction of this rule so as to determine whether two counsel might argue each side of every point. It was held that the rule would not bear that construction. The chamber is well adapted to audience. The conversational tone, easily heard, is the prevailing style of speech. Nothing is gained by vehemence, or lost by moderation. The court is not taken by storm, nor captured by empty oratory. It is most open to the persuasion of reason. The spirit of the place is that of calm enquiry, due consideration and right judgment. The consultation of the justices is described by an ex-associate, who says:

"In the conference the chief justice usually called the case. He stated the pleadings and facts that they presented, the arguments and his conclusions, and invited discussion. The discussion was free and open among the justices till all were satisfied. The question was put whether the judgment or decree should be reversed, and each justice, according to his precedence, commencing with the junior judge, was required to give his judgment and his reason for his conclusions. The concurring opinions of the majority decided the cause, and signified the matter of the opinion to be given. The chief justice designated the judge to prepare it." This method secures the attention of every justice to each case, so that the judgment of the court is the judgment of each and all its members—not the opinion of one accepted by the others. The rapidity with which business is dispatched is exhibited in a table in 14th Wallace, giving the date of the argument and of the decision of each of sixty-eight cases reported in that volume. The cases were generally decided in from two to four weeks after submission.